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PROTECTING OUR STUDENTS

A Review to Identify & Prevent Sexual Misconduct in Ontario Schools

REPORT



**The Honourable
Sydney L. Robins**

2000

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**A REVIEW TO MAKE RECOMMENDATIONS
TO IDENTIFY AND PREVENT
SEXUAL ASSAULTS IN ONTARIO SCHOOLS**

**EXAMEN VISANT À RECOMMANDER DES
PROCÉDURES D'IDENTIFICATION ET DE
PRÉVENTION DES CAS D'AGRESSION
SEXUELLE DANS LES ÉCOLES DE
L'ONTARIO**

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February 29, 2000

**The Honourable James M. Flaherty
Attorney General of Ontario
720 Bay Street
Toronto, Ontario
M5G 2K1**

Dear Mr. Attorney:

**Re: A Review to Identify and Prevent Sexual Misconduct in Ontario
Schools**

Pursuant to Order in Council 1308/99, as amended by Order in Council 1734/99,

I have the honour to present to you my Report in this matter.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sydney L. Robins".

Sydney L. Robins

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Dr. Peter Jaffe, the Director of The London Family Court Clinic, served as consultant to the review, assisted by his colleagues Alison Cunningham and Pamela Hurley. Their extensive experience and expertise in research, training, and clinical work involving children and adolescents who have suffered abuse was very important to the considerations underlying this Report. It was an education - and a pleasure - for me to have been able to work with them.

Elizabeth Moore and Martin Dionne, were the review's legal researchers. Their assistance in assimilating the mass of material presented to us, in researching legal issues, and in a host of other matters, is very much appreciated. Each of these young people came to us after having been law clerks to the Ontario Court of Appeal. A few days ago they were called to the Bar of Ontario, and now begin what I predict will be highly successful careers in the law.

I am particularly indebted to all the individuals and organizations who gave me the benefit of their experience and made their concerns known to me by filing written submissions, by responding to questionnaires and requests for information, and by meeting either with me or my staff. In the end, of course, responsibility for any errors that may appear in this Report, or for any of its shortcomings, is mine alone.

Teresa Broderick, my secretary, was unflappable in the demanding task of processing the many drafts, rewrites and revisions of this Report as it made its way to completion. I thank her, as I do Elizabeth Brooker, our administrator, who organized our offices and attended to the innumerable

details that come with a government review. I also extend my thanks to Roland D'Abadie, for his advice and guidance; to Krystyna Krywoj for her many courtesies; and to Andrea Tuck-Jackson and Danielle Royal for their very helpful contributions.

Finally, in this, as in everything in my life, Gloria's love and encouragement mean more to me than words can say.

February 29, 2000

S.L.R.

I

THE NATURE AND SCOPE OF THE REVIEW

A. Introduction

While most teachers are respectful of their positions of trust and authority with students, there are some who breach that trust and misuse their authority to sexually assault children. This is such a heinous crime that it is easier for others in the environment to deny that it is happening at all rather than to face its existence. Teachers are not sufficiently aware of the signs indicating the presence of sexual assault, and protocols are not always in place to deal with incidents of abuse of students by teachers. Students who have experienced previous abuse may not know they can seek recourse and often they are not aware of whom they can trust to tell what's happening. Teachers who are found to have assaulted students continue to work in the educational environment.¹

On April 9, 1996, Kenneth DeLuca pleaded guilty to 14 separate sexual offences, involving 13 victims.² The crimes took place from 1972 to 1993. Each was committed while DeLuca was a teacher with the former Sault Ste. Marie Roman Catholic Separate School Board. All of his victims were females, all but one were students.³ Their ages ranged from 10 to 18.

¹ Canada, *Final Report of The Canadian Panel on Violence Against Women* (Ottawa: Ministry of Supply and Services Canada, 1993) at 257.

² Additional charges involving the same and other complainants were withdrawn by the prosecution. This represented no concession by the prosecution that the additional charges lacked merit but, rather, a negotiated resolution of all criminal charges which DeLuca faced.

³ One victim was herself a school board employee.

DeLuca's crimes represent the ultimate breach of the trust reposed in a teacher. He was every parent's nightmare — a teacher who sexually preys on students. His conduct severely damaged his victims' physical and emotional well-being and, in some cases, has had a devastating impact on their lives.

As early as 1973 and at numerous times thereafter, complaints were made about DeLuca's sexually abusive conduct to principals, other teachers and school board officials. Though the complaints were well-founded, they were not acted upon. The crimes continued unabated for over 20 years. Indeed, DeLuca easily moved from school to school, leaving behind emotionally wounded victims, with a fresh opportunity to victimize others.

When DeLuca's crimes were belatedly exposed through the criminal process, it became clear that the educational system had failed his victims. The community was understandably shocked. What went wrong here? How could this abuse have gone unchecked for twenty years? What protocols or procedures existed to protect children from such abuse? What can be done to ensure that this will not happen again?

These questions raise issues of great importance and require serious attention. After all, children are our most precious asset. Schools are intended to be healthy and nurturing environments within which children can safely learn and grow. When a school environment is poisoned by sexual crimes or harassment, it is of fundamental concern to us all.

The vast majority of teachers are unquestionably highly dedicated and caring professionals who seek to ensure a safe learning environment for their students. They are no doubt appalled by conduct such as DeLuca's, and are understandably concerned that such conduct may unfairly reflect upon them and their profession. Some are also concerned that a heightened sensitivity to sexual abuse may inhibit an appropriate nurturing relationship between teacher and student and deprive children of the warmth and compassion of those who educate them. Most are concerned about false allegations of sexual abuse and the terrible damage that can result when such accusations are made against a teacher. I am very mindful of these concerns.

However, it must be stressed that DeLuca's case is not unique. Some abusive teachers, like DeLuca, are "opportunistic" sexual predators motivated by power, control and sexual gratification. Some are pedophiles who prefer

to have sex with children and have chosen to work in schools so they can better access their targets. Others have "romantic/bad judgment" relationships with students, believing that their conduct is either harmless or is acceptable because the students are said to be doing what they wanted to do. Many engage in sexual harassment or insensitive and inappropriate, though not necessarily criminal, conduct. This may demean or stigmatize their victims, cause them to become isolated and withdrawn from others, and interfere with their academic performance and emotional well-being. The unhappy reality is that these cases are not isolated. Indeed, they are more prevalent than the public and the teaching profession would like to believe.

While reliable statistics are hard to come by, the law reports, disciplinary cases, arbitration cases and media accounts indicate a significant number of cases in which Ontario teachers, and teachers elsewhere, have engaged in sexual misconduct against students. Moreover, it can safely be assumed that many, perhaps most, incidents of sexual misconduct remain hidden and unreported. Some studies suggest that a sizable percentage of students find sexual harassment by teachers within their school environment to be a problem. In short, it would appear that the reported cases of sexual misconduct represent only the tip of the iceberg.

Nor can the response to DeLuca's victims be regarded as unique. The issues raised by the complainants in the civil action that followed DeLuca's prosecution — reluctance on the part of teachers to report suspected sexual abuse by a colleague, intimidation of victims and their parents to prevent or discourage disclosure, failure to act upon disclosure of abuse, the inadequacy of records documenting complaints made, the transfer of a suspected abuser from school to school, the absence of screening procedures on the hiring of new teachers — have been seen, to varying degrees, in numerous other cases and in the literature documenting sexual abuse in the schools.

Of course, the physical and emotional impact of sexual abuse on DeLuca's victims is far from unique. Tragically, it is to be expected.

It follows that the DeLuca case provides an important framework for an evaluation of how suspected and proven sexual misconduct by teachers upon students is addressed and how it can be prevented or better identified and dealt with in the future. Though, since DeLuca, important changes have been made, they do not completely address these issues and, in any event,

practices widely vary from jurisdiction to jurisdiction within Ontario. Put simply, the problem remains.

This Report examines the issues raised by the DeLuca case and the lessons to be learned from it. The recommendations for change are designed in the hope that they will facilitate the identification and prevention of sexual misconduct within the Ontario school system, and thus better protect our students.

B. The Mandate

i) Overview

By Order in Council dated May 5, 1999,⁴ I was appointed to conduct a review into and prepare a report with respect to the following matter:

The incidents involving Kenneth DeLuca which gave rise to charges and the prosecution and guilty pleas of Mr. DeLuca with respect to the sexual assault of female students enrolled in the former Sault Ste. Marie Roman Catholic Separate School Board from the late 1970s to the early 1990s to the extent appropriate to make recommendations regarding protocols, policies and procedures to effectively identify and prevent sexual assault, harassment or violence.

My mandate carries with it two basic components: first, I am to review and report on the facts surrounding DeLuca's sexual offences upon female students enrolled in the former Sault Ste. Marie Roman Catholic Separate School Board. This may be characterized as the *factual* component of my mandate. Second, I am to make recommendations regarding protocols, policies and procedures to effectively identify and prevent sexual assault, harassment or violence. Since such recommendations are designed to

⁴ By Order in Council dated October 27, 1999, the termination date of October 31, 1999 was extended to February 29, 2000. (Appendix A—Orders in Council dated May 5, 1999 and October 27, 1999).

improve, in a systemic way, the identification and prevention of sexual abuse in the future, this is to be regarded as the *systemic* component of my mandate. Each requires elaboration.

ii) Factual Component of the Review

My Order in Council provides that I may:

- a) request any person to provide information or records to me where I have reasonable grounds to believe that the person has in his, her or its possession or control such information or records;
- b) hold such private meetings, for any person to provide information or records that are relevant to my mandate;
- c) rely on any transcript or record of pretrial, trial or other legal proceedings before any court in relation to any criminal or civil litigation or administrative proceedings with respect to DeLuca.

It is clear that I am to perform a *review*, not conduct a *public inquiry*. During a review, witnesses cannot be compelled to testify under oath. The production of documents may be requested but generally cannot be compelled. Persons providing relevant information or records may be consulted in private. There is no opportunity for interested parties to test the accuracy or veracity of other parties. Given these limitations, it follows that neither findings of credibility nor disputed findings of misconduct can fairly be made. Indeed, under my Order in Council, I am precluded, as is also the case in a public inquiry, from expressing "any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization....[or] making any findings of fact with respect to civil or criminal responsibility of any person or organization".

The factual issues surrounding the DeLuca case may be divided into two categories: 1) what was it that DeLuca did to each of his victims; and 2)

who knew or suspected what DeLuca was doing and how, if at all, did they respond and why.

The facts pertaining to the first issue—what was it that DeLuca did — are already extensively documented. Pursuant to my mandate, I have reviewed the voluminous record prepared for the criminal and civil proceedings against DeLuca, including the transcripts of DeLuca's preliminary inquiry, the Agreed Statement of Facts submitted to the sentencing judge, the statements that DeLuca's victims provided to the police, the evidence of DeLuca's victims and the other parties to the civil litigation given under oath in their examinations for discovery, and the transcript of DeLuca's parole hearing. Though DeLuca was not questioned about and did not admit to every allegation made against him, his pattern of sexual abuse is clear and the substance of his misconduct is generally acknowledged.

The facts relating to the second issue — who knew or suspected what DeLuca was doing and how, if at all, did they respond and why — while less certain, are also well documented. Pursuant to my mandate, I have again extensively reviewed the documentary record, most particularly the examinations for discovery in civil proceedings between DeLuca's victims and the School Board, its employees and others whom the victims regarded as sharing responsibility for DeLuca's conduct. Had these lawsuits proceeded to trial, the factual issue which I have identified here would have been addressed. However, the lawsuits were settled on the eve of trial and there has therefore been no judicial determination of the issues they raised.

Having completed my review, I am satisfied that the resolution of any remaining factual disputes is not required to enable me to identify what went wrong in this case or to make recommendations as to how similar events might be prevented in the future. For example, it is readily apparent to me, without having to resolve any issues of credibility which may remain, that the response of the School Board and its employees to complaints or disclosures made by the victims was completely inadequate and, indeed, harmful. It involved, at times, stereotypical notions of what could be expected from a truthful victim, a minimizing of the seriousness of DeLuca's misconduct, a lack of objectivity and a self-serving approach to these complaints, a failure to properly investigate or document these complaints and a complete absence of appropriate policies, protocols and procedures to identify and investigate suspected abuse and prevent its continuation. In other words, the lessons learned from the DeLuca case are clear to me based upon the *uncontested*

evidence. These lessons resonate with the experiences of other complainants in similar cases.

As I indicated, the Order in Council provides that I am to review and report on the incidents involving DeLuca “*to the extent appropriate* to make recommendations regarding protocols, policies and procedures to effectively identify and prevent sexual assault, harassment or violence.” I have accordingly examined the facts pertaining to the incidents involving DeLuca to the extent necessary to make systemic recommendations. My review of those facts has enabled me to make the systemic recommendations contained in this Report.

I think it important to recognize that the public has had very limited information on what transpired during the DeLuca affair. The criminal proceedings were resolved without the necessity of a trial. This meant that the public was not informed, beyond the contents of the Agreed Statement of Facts presented to the sentencing judge, of what in fact had happened in its schools. Similarly, the settlement of the civil lawsuits operated to deprive the public of further information. This lack of information doubtless contributed to the community’s understandable outrage and its continuing concern for the safety and well-being of its school children. As one local organization wrote to me, “the community of Sault Ste. Marie is itself in need of healing from the negative effects of this case”.⁵

This Report, which will be released to the public, comprehensively outlines the available evidence on the factual issues earlier outlined. I am hopeful that, in addition to the systemic recommendations, the Report will inform the community of what happened here and help bring closure to this depressing affair.

iii) Systemic Component of the Review

The principal focus of this review is upon systemic recommendations for change. Pursuant to my mandate, I have made 101 recommendations. In doing so, I am mindful of several limitations which flow from the scope and nature of my mandate.

⁵ Submission of the Sexual Abuse Co-ordinating Committee (Sault Ste. Marie).

I have previously noted that I am prohibited from making findings of criminal or civil responsibility and from making any recommendation regarding civil or criminal responsibility of any person or organization. This accords with the jurisprudence governing both public inquiries and reviews. In accordance with this prohibition, I have not made any findings of civil or criminal responsibility and have not recommended that criminal, civil or disciplinary proceedings should or should not be instituted against any person or organization. My Report should be read in the context of this prohibition.

My powers and obligations in conducting a review have been conferred by the Province of Ontario. My Report is to be directed to the Attorney General of Ontario. It follows that I am directed to make recommendations regarding protocols, policies and procedures to effectively identify and prevent sexual assault, harassment or violence *in Ontario*. I have been mindful of this provincial limitation in formulating my recommendations. However, several issues identified during this review raise national issues of importance, particularly since criminal law, procedure and evidence fall within federal jurisdiction. Given their importance, I felt an obligation to, at least, identify these issues and their possible resolution. Given the existence of federal-provincial committees on justice issues, the identification of these issues also enables the provincial government to formulate its position on them and to advance that position in discussions with the federal government.

The systemic issues referred to in the Order in Council, namely, the identification and prevention of sexual assault, harassment and violence, if read in isolation, would be virtually limitless and unmanageable. They must be interpreted in light of the incidents involving DeLuca which motivated this review. The Order in Council makes this connection between the events involving DeLuca and the systemic recommendations clear. Accordingly, the systemic issues which I have examined are reasonably related to the issues arising out of the DeLuca case though, of course, recommendations too closely tied to the precise facts in DeLuca would be of little systemic value. I have struck the balance in this way:

1. I have not examined sexual misconduct by students upon other students. As a teacher, DeLuca was in a position of trust. His case involves the abuse of that trust. Teachers are almost invariably in a position of trust, power or authority in relation to their students. The *Criminal Code of Canada* specifically provides that no consent is

obtained, for the purposes of various crimes, including sexual assault, where the complainant is incapable, by reason of age, of giving legal consent or where the accused induced the complainant to engage in sexual activity by abusing a position of trust, power or authority. Indeed, the *Criminal Code* specifically criminalizes the sexual exploitation of young persons by a person in a position of trust or authority towards that young person, regardless of whether the young person could or did consent. Put simply, any sexual activity by teachers with students raises issues of sexual misconduct. Many of the issues that apply to teachers or school employees have little application to relationships between students. That being said, I am hopeful that implementation of the recommendations contained in this Report will contribute to a healthier school environment, which would include a heightened awareness of and sensitivity to sexual misconduct by students and, therefore, to a reduction in sexual offences and harassment generally.

2. I have examined, to some degree, sexual abuse by school employees other than teachers and by school adult volunteers, since the systemic issues that pertain to teachers have equal application, in most instances, to other school employees and adult volunteers. For convenience, I generally refer only to teachers in this Report unless the context requires otherwise.
3. Of necessity, my mandate did not permit examination of sexual misconduct in all educational settings. My focus was upon elementary and secondary schools. Post-secondary schools, universities, community colleges and adult educational programs raise additional issues beyond the scope of this review. Similarly, my mandate did not permit examination of private schools. Nonetheless, I expect that many of my recommendations will have relevance to post-secondary education and to private education. Finally, I am mindful of the many cases (some still before the courts) both in Ontario and elsewhere in Canada involving proven or alleged sexual abuse at

residential schools or at training schools. These cases raise critically important issues, a number of which do not arise in the DeLuca case and are well beyond the scope of my mandate.⁶

4. Though DeLuca's crimes involved sexual abuse by a *male* teacher upon *female* students, I have examined sexual misconduct by teachers of either gender upon students of either gender. Any limitation of my review to sexual misconduct by males upon females would be arbitrary, and inconsistent with our fundamental values. As will be reflected later in this Report, although sexual misconduct by female teachers is relatively rare, it does occur, and both male and female students are commonly the victims of sexual misconduct.
5. I have not examined violence by teachers upon students unrelated to the sexual integrity of those students. The phrase "sexual assault, harassment and violence" contained in the Order in Council was intended, in my view, to extend to criminal and non-criminal conduct directed to or against students which tends to interfere with the sexual integrity of those students. Sexual crimes usually violate the bodily integrity of their victims and are inherently crimes of violence. A sexual assault is distinguished from an assault, in law, because it is committed *in circumstances of sexuality*. The term *violence* need be understood in this context. School violence, unrelated to the victim's sexual integrity, raises issues well beyond the scope of this review.

⁶ The systemic issues arising from these many allegations of institutional child physical and sexual abuse across Canada are presently being examined by the Canada Law Commission pursuant to a reference by the Minister of Justice and, in Nova Scotia, by a review being conducted by the Honourable Fred Kaufman, of the governmental response to institutional abuse in that province.

C. Definitions of Sexual Misconduct, Abuse and Harassment

Of course, it is of critical importance to define what criminal and non-criminal conduct of a sexual nature by teachers directed at or against students should be proscribed. In doing so, I have drawn, in part, upon the various *Criminal Code of Canada* sections that create sexual offences and upon human rights legislation such as the *Ontario Human Rights Code* which addresses sexual harassment and discrimination. These and other legislative provisions are more fully addressed elsewhere in this Report.

Sexual offences may involve exposure of private parts, touching or other physical contact, invitations to touch, fondling or intercourse.

Sexual harassment may be verbal or visual. It may include comments about a student's physical characteristics, suggestive or offensive remarks or innuendoes, propositions of physical intimacy, threats or taunting, leering or inappropriate staring, demands for dates or other sexual favours, offensive jokes, displays of sexually offensive pictures, graffiti or other materials, inappropriate questions or discussions about sexual activities, and generally, behaviour which is unwelcome and sexual in nature. Behaviour which is not explicitly sexual may amount to sexual harassment when viewed in context.⁷

Frequently, the term "sexual abuse" is used to describe improper conduct by teachers. This terminology admits of some confusion. "Sexual abuse" is generally understood by many to describe conduct which involves physical contact between abuser and victim which is criminal and which involves a significant age differential between the parties. (Indeed, I use the term in this way to describe DeLuca's criminal activity.) However, the term has also been used to denote criminal activity which does not involve physical contact (such as indecent exposure) or offensive conduct which is not criminal (such as a teacher's unwelcome comments about the size of his student's breasts).

Similarly, the term "sexual harassment" is often used (as I sometimes do in this Report) to describe non-criminal but offensive conduct such as

⁷ Ontario Human Rights Commission, *Policies and Guidelines on Sexual Harassment and Inappropriate Gender-Related Comments and Conduct* (1996) (Toronto: Ontario Human Rights Commission, 1996).

described earlier. However, human rights jurisprudence makes clear that criminal conduct, such as forced intercourse, may, in law, constitute sexual harassment.

I introduce the term “sexual misconduct” here to address the full range of activities by teachers which should be proscribed. In doing so, I seek to avoid labels which are too easily misunderstood. For example, given the conventional understanding of sexual abuse, the most highly pejorative of these terms, it should not be used lightly lest the term become trivialized. “Sexual abuse” appropriately describes a sexual assault but may not always be suitable to describe an off-colour, offensive joke which nonetheless should be proscribed. Conversely, to use the term “sexual harassment” to describe criminal conduct such as forced intercourse would run the risk of deprecating its seriousness. The objective here is to avoid trivializing serious conduct or overly stigmatizing inappropriate conduct which is based upon ignorance and which may be correctable. “Sexual misconduct” is capable of embracing the full range of unacceptable activity of a sexual nature, and avoiding the potentially misleading usages described above.

It follows from the above comments that sexual misconduct necessarily includes certain criminal conduct. It also encompasses sexual harassment and sexual discrimination, as defined by the *Ontario Human Rights Code*. As well, in the educational context, it also embraces offensive conduct which may not be criminal and may not constitute an infringement of the *Ontario Human Rights Code*. For example, highly sexualized comments or suggestions to a student (even if purportedly welcomed by that student) may not constitute harassment within the meaning of the *Ontario Human Rights Code* but nonetheless are fundamentally inconsistent with the proper role of a teacher and likely to adversely affect the school environment. Some sexual relationships involving teachers and former students raise similar concerns.

In summary, sexual misconduct is offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment. A more precise delineation of the boundaries set by this definition is developed later in this Report.

D. DeLuca's Victims

During this review, I met with a number of DeLuca's victims and invariably found their input to be insightful and of assistance. This assistance is reflected in various passages, most particularly, in Chapter II.

I am mandated to prepare this Report in a form appropriate for release to the public pursuant to the *Freedom of Information and Protection of Privacy Act*. Accordingly, I have substituted initials for the names of the victims throughout this Report to preserve their privacy and avoid their re-victimization. This practice accords with well-established precedent and publication bans previously imposed by the courts and, indeed, with the publication ban which was imposed in the DeLuca criminal proceedings, and which remains in effect.

It is with some hesitation that I refer to these women (and others similarly situated) as "victims" or "complainants" in this Report. This terminology tracks the language used in various legal proceedings, legislative provisions and studies and sometimes, need be used to describe their status at various stages in the legal process. However, I am mindful of the fact that the use of the term "victim" to describe these individuals creates the risk that they will be defined by their victimization, rather than by their affirmative steps to overcome their ordeals. Hence, the term "survivor" has also been introduced into the literature to describe these individuals.

I wish to publicly acknowledge the great courage demonstrated by the women against whom DeLuca perpetrated his crimes. They are "survivors" in the fullest and most positive sense of that word.

E. The Process

At the earliest stages of the review, a toll free line was set up for persons wishing to discuss issues or make representations. An advertisement was placed in local Sault Ste. Marie newspapers inviting interested parties to file submissions, propose recommendations and provide relevant information.⁸ Questionnaires were designed and sent to all school boards and authorities

⁸ The advertisement is reproduced at Appendix B.

and children's aid societies in Ontario, so as to enable me to acquire a greater understanding of the current policies and protocols within or relevant to the school system that address sexual misconduct.⁹ Respondents were asked to provide available statistics and protocols, and to identify any key issues and dilemmas encountered by them when faced with allegations against teachers, other school staff and volunteers, and to provide submissions on how best to address the problem of sexual misconduct in Ontario schools. Submissions were also requested from 17 of the province's larger police service boards or police forces and from principals' associations, parents' associations and students' associations.¹⁰

At the same time, I engaged in a far-ranging consultative process with elementary and secondary school boards in both the public and separate school systems, trustees and teachers, through their respective associations, and legal counsel for these boards and associations. All of these parties demonstrated a significant interest in addressing the important and difficult systemic issues raised by the review mandate. The early consultative process enabled them to assimilate relevant materials and, in many instances, to propose recommendations for my consideration. I am indebted to them for their important contribution to this review. My own staff also assimilated relevant materials, both in relation to the DeLuca proceedings themselves and in relation to the systemic issues presented by this review.

I travelled to Sault Ste. Marie and interviewed a number of DeLuca's victims and, in some cases, their parents, and other interested parties who wished to speak with me. The consultative process was important to a fuller understanding of what transpired in the DeLuca case and the formulation of my recommendations. I wish to express my gratitude to all of the interested parties for their substantial assistance.¹¹

⁹ The questionnaires are reproduced at Appendix C.

¹⁰ The parties to whom questionnaires were sent are listed in Appendix D.

¹¹ The organizations and individuals who were interviewed by the review, or who provided information, or made submissions, to the review, are listed in Appendix E. In cases where a submission identified, or could potentially identify, a victim of sexual misconduct, the name of the party that made the submission has not been included.

F. Structure of this Report

As reflected earlier, this Report addresses both factual and systemic issues. These are addressed in the chapters which follow.

Chapter II outlines the facts directly arising from the DeLuca affair. These facts relate to DeLuca's conduct, the response to complaints about his conduct and the impact of these events upon DeLuca's victims. My views on the conduct of DeLuca, the school boards, its officials and others are contained in italicized comments contained throughout the narrative and in a conclusion which ends the chapter. This conclusion considers what went wrong in the DeLuca case and provides a basis for later recommendations.

Chapter III examines the extent and nature of the problem of sexual misconduct by teachers as reflected in the jurisprudence, media accounts and, most particularly, in the literature. This examination considers the extent of the problem to be addressed systemically and the characteristics of teacher sexual misconduct which resonate with the lessons arising from the DeLuca case.

Chapter IV examines the laws pertaining to sexual misconduct by teachers upon students to the extent necessary to enable me to fulfill my mandate and make recommendations for change. These laws define and sanction sexual misconduct by teachers. They regulate the duties and obligations of third parties to address suspected or proven sexual misconduct. Evidentiary and procedural rules govern how, and whether, testimony of students alleging sexual victimization will be taken. The law also identifies and addresses stereotypical notions about sexual misconduct, its perpetrators and victims to be avoided.

Do these laws adequately define, and protect against sexual misconduct by teachers? Do they facilitate the identification and prevention of sexual misconduct in a way which is compatible with the rights of those suspected of misconduct? Do applicable evidentiary and procedural rules adequately reduce the exposure of students to gratuitous trauma as witnesses or to other re-victimization? To what extent can these rules better protect students in a way compatible with the interests of suspected teachers? These and other issues are addressed. Recommendations for changes to existing laws are reproduced in bold print throughout the chapter.

Chapter V seeks to address the concerns raised by teachers about false accusations of sexual misconduct, and makes recommendations in bold print in this respect. I have highlighted the nature of these concerns earlier in this introduction.

Chapter VI examines the policies, protocols and procedures which are relevant to the systemic issues under consideration. As will be evident, I am of the view that many of the concerns raised by this review are best addressed, not through legislative intervention, but through policies and protocols adopted by school boards across Ontario. For example, a policy on how complaints of sexual abuse should be acted upon which is clear, fair and known to all is likely to protect students, ensure fairness to the affected teacher, provide assurance to the community and enhance the school environment. Accordingly, this chapter reviews existing policies and protocols and makes recommendations for change. These recommendations are again reproduced in bold print throughout the chapter. Chapters IV, V and VI are often interrelated. After all, the best policies and procedures must recognize and complement existing laws. In addition, they must strike an appropriate balance between concerns about false accusations of sexual misconduct, and the need to protect our students. Chapter VI concludes with sample policies and protocols currently in use by school boards in Ontario, as well as a checklist to assist school boards in developing their own policies and protocols.

The structure of this Report recognizes that it is written for more than one audience. For example, the detailed review of the law contained in Chapter IV may be of limited interest to some readers, but is primarily directed to government, legal counsel and adjudicators likely to hear cases of alleged sexual misconduct. Similarly, the detailed factual analysis of the DeLuca affair contained in Chapter II (as opposed to the lessons learned from that case) may well be more relevant to the Sault Ste. Marie community than to others.

II

THE DeLUCA AFFAIR

A. DeLuca's Background

Kenneth DeLuca was born on April 30, 1948 and grew up in Sault Ste. Marie, Ontario. He attended Lake Superior State College in Michigan, majoring in psychology and sociology, and earned a Bachelor of Arts Degree in 1970. He obtained an Ontario Interim Elementary School Teacher's Certificate on June 24, 1970, and began teaching with the Sault Ste. Marie Separate School Board the following September. In 1972, while teaching, DeLuca obtained a Master of Arts in Education from Northern Michigan University, as well as a permanent Elementary School Teacher's Certificate. In 1976, he obtained an Education Specialist Degree from Northern Michigan University, where he majored in elementary education. He remained a teacher with the School Board until his arrest in June 1994.

DeLuca has been described as tall, handsome, outgoing, athletic, active in sports, charming and personable. However, he had a dark side—a Jeckyl and Hyde personality. Though he appeared outwardly to be a capable teacher, he was in fact a bully with an explosive temper. Tragically, he was also a sexual predator.

B. Criminal Proceedings against DeLuca

Criminal charges were first laid against DeLuca in June, 1994, and additional charges were laid through October, 1994. In total, DeLuca was charged with 41 offences involving 21 complainants, relating to events that occurred between 1972 and 1993. All but one of those complainants were former students of the Sault Ste. Marie School Board ranging from age 10 to

18; the other complainant was a School Board employee. The preliminary inquiry into these charges was held in February and March 1995. DeLuca was ordered to stand trial on all but two of the charges. On April 9, 1996, in accordance with a plea negotiation entered into with the Crown, DeLuca pleaded guilty to, and was convicted of, 14 offences before the Ontario Court (General Division) in Sault Ste. Marie: six counts of indecent assault, seven counts of sexual assault, and one count of counselling a young person to touch for a sexual purpose. These convictions related to 13 of the original complainants.

In an agreed statement of facts that was read in open court (the "Agreed Statement of Facts"), DeLuca admitted to various incidents of abuse involving these complainants. As part of the plea negotiations, the Crown agreed that it would not proceed with certain additional charges involving these and other complainants. However, the Crown made it clear that its decision not to pursue the other charges was not to be taken as a concession by the Crown that the original charges lacked merit.

After hearing the submissions of counsel, Madam Justice Pardu sentenced DeLuca to serve a total of 40 months imprisonment in a federal penitentiary.¹ She began her reasons for sentence by describing DeLuca as "a school teacher who has preyed upon young female students for more than 20 years", and went on to state:

Eight of the victims were assaulted when they were in public school, when they were between 10 and 13 years of age. Four of the victims were high school students and one was an adult, a co-ordinator of community schools.

The adult complainant had received reports of the accused's behaviour towards two young female students. In October of 1989, she sought his resignation from a night school class for which she was responsible. She confronted him and he reacted by grabbing her and making rutting motions against her private parts with his pelvis. Although the accused did resign from the night school course, the accused was not deterred from continuing with his assaults.

¹ The breakdown of the sentence on each charge is set forth in Appendix F.

The assaults on the young public school students included the accused inserting his tongue in a girl's mouth, touching of breasts and genitals, making a girl touch his penis and rubbing his body against a child's body. He cornered the girls in supply rooms, empty classrooms and closets.

On one occasion he arranged for a student to come to the school at 7:00 p.m., telling her it would help her get an award. He grabbed her and laid on top of her and rubbed himself all over her, biting her chest, breasts and vagina, through her clothes.

He touched a high school girl on the breast, and made movements with his pelvis against the bodies of several high school students.

Most of the assaults were accompanied by inappropriate sexual remarks.

He attempted to use marks and admission to school programs to achieve his sexual purposes.

These offences call out for a substantial period of incarceration. Parents in the community send their children to school in the hope and expectation that their children will be safe. This accused can only be described as a sexual predator, and he has betrayed the trust of his students, their parents, his colleagues and the community.

Complaints were made about the accused's behaviour as early as 1973. From 1973 to 1993 at least seven or eight complaints were made about the accused's behaviour towards female students. Regrettably, nothing was done to respond to these complaints, apart from the confrontation by [Ms. Doe] in 1989. The courage displayed by the complainants in coming forward is all the more commendable in light of the discouragement they must have felt from the lack of the response to their reports of sexual assaults.

It is difficult to measure the effects of the assaults upon the complainants. The assaults caused emotional trauma of varying degrees and the education of some of the victims was disrupted.

The breach of trust by the accused, the age of the victims, the repetition of the offences and the long period of time over which the offences continued are seriously aggravating factors.

The accused has pleaded guilty, albeit on the morning set for the commencement of his trial. This is a first public indication of remorse on his part, and constitutes a declaration to the victims and to the community that he is guilty of the assaults alleged. The victims have thus been spared the task of testifying again, at a trial, and the uncertainty associated with any trial has been removed. Had this matter proceeded to trial, 12 jurors would have had the unenviable and onerous responsibility of assessing guilt in relation to each of the allegations, and this could have occupied as much as six or seven weeks.

The accused has no previous record. He will not ever likely be permitted to teach again. He has lost his livelihood as a result of these offences and that is entirely appropriate. Any financial resources he has will likely be exhausted in compensating the victims.

I am of the opinion that the joint submission by Crown and defence counsel reflects an appropriate balance of the need for deterrence of this accused, general deterrence and the rehabilitation of the accused.

A sentence of incarceration of 40 months in a federal penitentiary is in the public interest in these circumstances and the accused will be given that sentence.

C. Cancellation of DeLuca's Teaching Certificate

DeLuca's case was referred to the Relations and Discipline Committee of the Ontario Teachers' Federation by the Minister of Education following his conviction and sentencing. A hearing was held on August 26, 1996. DeLuca was given notice of the hearing, but did not attend. The

Committee found that DeLuca had breached sections 14(d) and (f) of the Regulation made under the *Teaching Profession Act*, which provide:

A member shall,

- (d) show consistent justice and consideration in all his relations with pupils;
- (f) concern himself with the welfare of his pupils while they are under his care.

The Committee recommended to the Minister that DeLuca's teaching certificate be cancelled. It gave the following reasons for its recommendation:

1. DeLuca entered a plea of guilty to fourteen (14) sexually related charges from thirteen (13) female complainants, and he was sentenced to 40 months in a federal penitentiary.
2. DeLuca attempted to use marks and admission to school programs to achieve his sexual purposes.
3. That "the breach of trust by the accused, the age of the victims, the repetition of the offences and the long period of time over which the offences continued", was given as reasons for sentence by Madam Justice Pardu.

The Minister cancelled DeLuca's teaching certificate effective October 11, 1996.

D. Civil Actions Against DeLuca and the School Board

A number of DeLuca's victims (the "plaintiffs") initiated civil actions against DeLuca, his wife, the School Board, various School Board officials, and others, including Wayne DeLuca, John Cameletti, William Struk, Monsignor David Cresswell, Donald White, Gary Barone, Ray Mask, Dwight MacFarlane, Harvey Barsanti, John DeFazio and Don Muio (the "defendants"). A number of related claims were also asserted in the same actions on behalf of the plaintiffs' parents, siblings, husbands and children.

The plaintiffs claimed that as a result of DeLuca's abuse, harassment and invasions of privacy, they had suffered and continue to suffer damages including low self-esteem, depression, emotional and mental distress, nightmares, difficulty in developing meaningful and healthy relationships, inability to trust other individuals, flashbacks, alienation from parents and other family members and inability to concentrate. Particulars of the abuse included hugging, kissing and confining the plaintiffs; fondling the plaintiffs' breasts and/or vaginal areas; forcing the plaintiffs' to touch his penis, and forcing his genital area against the plaintiffs. Particulars of the harassment and invasions of privacy included sitting down directly in front of the plaintiffs with his legs spread open, sometimes with an erection; leering, winking and licking his lips; stroking the plaintiffs' shoulders, arms, heads, hands; commenting about their physical stature or qualities; inquiring about their personal lives and speaking in a lewd manner.

The plaintiffs claimed that the School Board, and its named officials and employees, were liable because they knew or should have known of the assaults, harassment, and invasions of privacy by DeLuca, but failed to take reasonable steps to prevent the abuse. The plaintiffs alleged that the defendants should have advised the appropriate authorities (including the police, the Children's Aid Society and the plaintiffs' parents) of the assaults or of the allegations of assault; appropriately monitored and inspected DeLuca's behaviour in the classroom; recorded incidents of sexual assaults, harassments and invasions of privacy for future reference; terminated DeLuca's employment as a teacher; implemented proper guidelines, inspection regimes and screening or assessment processes; and should not have intimidated the plaintiffs to avoid further complaints against DeLuca.

While two of the civil actions were settled earlier, the remainder were settled in September, 1998, after examinations for discovery of the plaintiffs and defendants had been completed and a pre-trial conference had been conducted. As part of the settlements, the parties agreed to maintain the confidentiality of the settlement terms. It can be said, however, that the settlement required the School Board to pay monetary damages to the plaintiffs.

In August, 1998, prior to the settlement of all of the civil actions, Dr. Cecil Somme, the current Director of Education at the School Board, personally delivered letters of apology to each of the plaintiffs in the civil actions. The letters contained an apology and an acknowledgment of

responsibility on behalf of the administrative staff, teachers, support staff and trustees of the School Board as follows:

There are no words that can adequately convey to you, and those close to you, our profound regret and sorrow at the pain caused by the criminal actions of Ken DeLuca.

The Huron-Superior Catholic District School Board formally extends its apology to you for the tragic events that occurred during the time of Mr. DeLuca's employment as a teacher with the predecessor Board - The Sault Ste. Marie District Roman Catholic Separate School Board.

Each one of us - administrative staff, teachers, support staff and trustees - is profoundly sorry. What you experienced and have had to go through is a depth of pain and suffering that we can only begin to understand.

There is no doubt that you were an innocent victim and were completely blameless in regards to DeLuca's actions.

Some of the people responsible for safeguarding you, and the system they functioned in at the time, failed in preventing harm being done to you. Additionally the system failed to respond adequately to the situation and to your cries for help.

We offer you our sincerest feelings of sorrow and deepest apologies for the failures of individuals and of our system that added to your suffering. The failures experienced are not excusable and the absence of support for you and other innocent victims was tragic.

We have all learned a great deal in the revelations regarding Mr. DeLuca's actions and of how the system addressed these matters. We do pledge to you, and to those we are entrusted with now and in the future, that each of us will do everything humanly possible to ensure that the hurt you endured never happens to anyone ever again.

We have, and will continue to, diligently improve our system of policies, procedures, staff awareness, training and heightened sensitivity so that we become aware of and eradicate those actions or attitudes which allowed the events of the past to occur.

Following the settlement of all of the civil actions, the School Board published the following public apology in the local press in November, 1998:

Between the years 1972 and 1993, a teacher in the employ of the Sault Ste. Marie District Roman Catholic Separate School Board (a predecessor of the Huron-Superior Catholic District School Board) committed repeated sexual assaults upon several of his female students. Most of these assaults occurred during school days, on school property.

On several occasions during the time these assaults were occurring, a number of the students or their parents reported the assaults to Board officials and employees. However, no appropriate or effective action was taken by some officials and employees of the Board to prevent the continuation of the assaults.

In 1995, 16 of the women who had been the victims of the assaults, commenced a Court action against the Sault Ste. Marie District Roman Catholic School Board and others, for compensation for the abuse they had suffered and the consequent devastation of their lives. The court action was settled this fall, shortly before it was to go to trial.

The Board recognizes that no financial recompense can ever make up for the trauma and humiliation which these women have endured. The Board recognizes, as well, that had the officials involved acted in a timely and effective way when these assaults were first brought to their attention, much of this suffering would have been prevented.

The Board of Trustees, recognizes that some of its senior officials and employees entrusted with the safety of its students, failed in the discharge of their responsibilities. For this, the Board offers its most sincere and heartfelt apology to the victims and their families. While this apology should have been

forthcoming much sooner, the Board hopes that it will be accepted in the spirit in which it is extended.

The Board has learned a hard lesson, but it is one which will serve to make the Board vigilant to see that such a tragedy never occurs again. We can only hope that this assurance and this apology will, in some measure, help to ease the pain of the victims in this tragedy.

Under the direction of Dr. Somme, the School Board has implemented important measures to address the systemic issues raised by the DeLuca case, and to ensure that this kind of case will not happen again. A number of these measures will be referred to in Chapter VI.

E. DeLuca's History of Sexual Abuse

The history of DeLuca's sexual abuse of his students, as set out below, has been gathered from the following sources:

- (a) Statements taken by the Sault Ste. Marie Police Department during its investigation of DeLuca, 1993 - 1994;
- (b) Transcript of the proceedings of the preliminary inquiry regarding the charges against DeLuca on February 6-10 and March 23, 1995;
- (c) Transcript of the proceedings of the guilty plea and sentencing of DeLuca on April 9, 1996 and the Agreed Statement of Facts filed with the Court;
- (d) Transcripts of Examinations for Discovery in the civil actions;
- (e) Edited Transcript of DeLuca's parole board hearing conducted on July 24, 1997; and
- (f) Miscellaneous documents provided to the review which were produced in the civil actions and/or obtained by the police during their investigation.

DeLuca's sexual misconduct is well documented from these sources. DeLuca has not acknowledged or been questioned about some of the allegations made against him. This has been noted in the outline which follows. However, as stated in Chapter I, DeLuca's sexual abuse of his many victims is clear and the substance of his conduct is now, belatedly, admitted.

The response to DeLuca's sexual abuse by the School Board, its officials and employees and others, while it was ongoing, is also extensively addressed in the testimonial and documentary sources listed above. A number of conflicts in the evidence remain. Again, these conflicts are noted in the detailed outline which follows. I remain mindful of my earlier comments that I am prohibited from making disputed findings of fact or recommendations with respect to civil or criminal responsibility of any person or organization. Accordingly, I have not made any such findings or made any recommendations that civil, criminal or disciplinary proceedings be instituted against any person or organization. Similarly, my mandate prevents me from making findings of misconduct against named persons or organizations in the face of conflicting evidence. Accordingly, I have not done so. My Report, including the comments I may make during the course of the factual narrative, should be read in the context of these limitations. I am otherwise able to draw obvious inferences and general conclusions from the evidence available and have done so throughout this Report. These fully enable me to articulate the lessons learned from the DeLuca case and to formulate the recommendations which later follow.

With those observations in mind, I turn to consider the events which ultimately gave rise to the prosecution of DeLuca and to detail, so far as possible on the available material, the circumstances in which this predator was permitted to sexually abuse young children entrusted to his charge for some 22 years.

i) St. Joseph School (1970-1972)

DeLuca began his career at St. Joseph School in Sault Ste. Marie where he taught grades six, seven and eight from September 1970 to June 1972. The principal of St. Joseph School at the time was Sister Grace Roddy.

No allegations of sexual misconduct have been made against DeLuca with respect to this assignment. However, a complaint was made to the

principal about DeLuca's excessive use of force. As a result, William Struk, then the School Board's Assistant Superintendent of Schools, advised DeLuca to refrain from using physical force, and documented this discussion in a classroom visitation summary dated February 2, 1972.

DeLuca was transferred to Canadian Martyrs School in 1972. According to Struk, the transfer was made on the basis of DeLuca's lack of seniority and in light of the declining enrollment at St. Joseph.²

ii) Canadian Martyrs (1972 - 1974)

DeLuca taught grade seven at Canadian Martyrs School from September 1972 to June 1974. Don White was the principal during this period.

According to White, when DeLuca arrived at Canadian Martyrs in September, 1972, White was not provided with any information about DeLuca's qualifications, skills or suitability, and did not conduct a reference check or make any such inquiries.³ White did not receive Struk's 1972 classroom visitation summary discussing DeLuca's excessive use of force. According to White, this record would not have been in DeLuca's school file but would have been in the School Board's files which, in any event, he did not review. White says that no one ever told him that this document existed.

White, as principal, made no inquiries about a new teacher being transferred to his school to determine whether the teacher had had any problems at his previous school. As a matter of School Board practice, DeLuca's file should have accompanied him and been provided to his new principal so as to make him aware of the past performance of this new member of his staff.

² Struk's recollection of events has been obtained from his police statement and his evidence given at his examinations for discovery in the civil actions.

³ White's recollection of events has been obtained from his evidence given at his examination for discovery in the civil actions.

Incidents of abuse at Canadian Martyrs

A

A was in DeLuca's grade seven class in 1972-1973. At that time she was 11-12 years old. DeLuca was charged with six counts of indecent assault against A. He pleaded guilty to one count of indecently assaulting A "on numerous occasions".⁴

A recalls that DeLuca often kept her in the class at recess and gave her small tasks to perform; he asked her about her family, and kissed and hugged her in a parental way. Very early in the school year, the nature of these affectionate episodes changed. Incidents of sexual abuse occurred in the supply room during class, in the staff room, and in the hallway when A went to the washroom. DeLuca acknowledges that he kissed A on the mouth and probed deeply with his tongue, undid her bra and felt her breasts, put his hands down her pants and touched her genitals, put her hands down his pants and forced her to touch his penis, and exposed his penis to her. He also placed A's hand on his erect penis and said, "this is what you do to me, A" or "I love you Dolly". DeLuca told A that he would have to put on his blazer so as to hide the bulge in his pants.

Additional incidents involving A were admitted by DeLuca:

1. On one occasion, DeLuca announced to the class that they were going to have a verbal quiz. DeLuca placed his chair beside A's desk, which was at the back of the classroom. He told the other students not to look back, or they would receive a zero on the quiz. As he sat beside A's desk, DeLuca took his penis out of his pants, removed the pen from her hands, and placed her hand on his penis until he finished dictating the test. Although she was unable to write the test, DeLuca gave A a perfect score.

⁴ The incidents set out below regarding A were largely admitted by DeLuca as part of the Agreed Statement of Facts. A's recollection of other incidents not admitted by DeLuca has been obtained from her police statements dated June 13, 1994, June 20, 1994, and August 18, 1994, her evidence at the preliminary inquiry, and her evidence at her examination for discovery in the civil actions.

2. On another occasion, DeLuca took A to the staff room. He undid her blouse and bra and pulled her pants down. He pulled his pants and briefs down, laid on top of her and touched her breasts and genitals. He put his penis against her genital area but did not penetrate her. DeLuca told A that he loved her and, though he knew it wasn't right, he couldn't help himself. He told her that he wanted to make love to her and that he wanted her to meet him before school one morning so that they could go to his cottage to make love.
3. On still another occasion, while in the principal's office, DeLuca took his erect penis out of his pants and placed her hand on it. He told her that she did this to him, and asked if she could do something to relieve his discomfort.

In an incident which A recalls but was not admitted by DeLuca, DeLuca asked A to stay in the gym. He physically pushed her up against the wall lifting her off her feet. He kissed her and pushed his erect penis against her body. A's evidence is that White, the principal, came into the gym at that time and asked what was going on. DeLuca said something to the effect that he had it "under control", and White walked away. White was not asked about this incident during his examination for discovery.

If A's account is accurate, White's failure to take any action upon discovering DeLuca and A in the gym is shocking. Even if he was unsure what was transpiring between A and DeLuca, upon witnessing physical contact between them, White should have removed A from the situation, investigated the matter, and if he had reasonable grounds to suspect that abuse had occurred, reported DeLuca to the Children's Aid Society or to the Crown Attorney.⁵

DeLuca admitted that as the school year progressed, he became more insistent that he and A make love. Near the end of the school year he accused

⁵ At the time, the *Child Welfare Act*, R.S.O. 1970, c.64, the predecessor to the *Child Family Services Act*, provided that "every person having information of the abandonment, desertion, physical ill-treatment or need of protection of a child shall report the information to a Children's Aid Society or Crown Attorney".

A of being a "cock teaser" and not a "cock pleaser", as he thought she would be. A wrote a note to a friend telling her that DeLuca said he was going to "fuck" her (A) if she was not careful. The note was intercepted by a student who gave it to principal White. A recalls White "interrogating" her about the note.

A's mother was called to the school in May 1973 by White to discuss the note.⁶ At first A's mother did not believe A had written it. White assured her that she had. He advised her to take A home and keep her there until the matter could be resolved. When A's mother questioned A, A disclosed only that DeLuca used to take her to the principal's office and undo her bra. A's parents and A returned to the school for another meeting. A's parents confronted DeLuca in White's presence about making improper advances towards A. DeLuca denied the allegations. He threatened to sue them for slander if they spread rumours about him. According to A's mother, DeLuca also told them to "sue if [they] wished, but that his teachers' union had more money than [they] did and it would be A's word against his". DeLuca said, "who do you think they would believe?".

According to A's mother, she and her husband then contacted the School Board. Her husband spoke to both John Cameletti, the Assistant Superintendent of Instruction and Curriculum, and Fred Mills, the Superintendent of Education. Her recollection is that their response was to this effect: "sue if you want, but remember, the Board has more money than you do". White believes that he reported the matter to Cameletti and some board members; Cameletti denies ever speaking with A's family or to White about the matter.⁷

A's mother says that she and her husband also contacted Father David Cresswell,⁸ the priest at St. Gregory's church, but that he did nothing to help them. A's mother told police that she heard from a relative that Father Cresswell had attended at Canadian Martyrs and told one of the classes not

⁶ A's mother's recollection of events has been obtained from a statement which she gave to the police on July 19, 1994.

⁷ White's and Cameletti's recollection of events have been obtained from their respective examinations for discovery in the civil actions.

⁸ Now Monsignor Cresswell.

to discuss "the rumours" with anyone. Father Cresswell maintains⁹ that he does not recall ever speaking with A's parents or discussing rumours with students.¹⁰

White was required by School Board instructions in effect between 1972 and 1974 to prepare a written report regarding allegations of physical or sexual abuse. Nonetheless, he has no recollection of making any report or keeping any notes about complaints involving A. His evidence is that he was in a "difficult spot" given that it appeared to be A's word against DeLuca's.

It is undisputed that A was sent home and, although she was allowed to pass her classes, she did not return to school that year.

According to A, after she was sent home, she was visited by a truant officer with the School Board. The truant officer spoke to A privately in her bedroom. According to A, she "sat beside me on the bed, tapped me on the knee and told me that she understood why I made up the lies, and left". The truant officer is now deceased and has given no evidence regarding the incident.

A's recollection is similar to that of another complainant, C, who was visited by the same truant officer. If accurate, it tells an outrageous story. The truant officer had either been told, before attending A's home, or simply assumed that A's complaint was a lie, and purported to "understand" why A had lied. The truant officer's attitude betrayed stereotypical notions of a child's lack of credibility and her motivation to lie. A needed somebody in authority to hear her complaint and investigate it. Instead, she was re-victimized. This could only confirm her fears that she would never be believed if she fully disclosed DeLuca's abuse.

The following year, A enrolled in the public school system. White's evidence is that he suggested that A withdraw from Canadian Martyrs, purportedly in accordance with a general policy that students who were having trouble at one school would be transferred to another to improve their

⁹ Monsignor Cresswell's evidence has been obtained from his examination for discovery in the civil actions.

¹⁰ Father Cresswell had no formal relationship with the School Board, but would sometimes provide religious instruction to students.

school life. He maintains that it was A's family who decided to transfer A to a public school.

A's mother recounted that it was "a very disgraceful time for our family. Rumours abounded and many questions were asked by relatives, neighbours and friends as to why A was not attending school". A found it very difficult at the new school. Rumours of her inappropriate sexual maturity had followed her there.

The rumours surrounding A's departure from Canadian Martyr and the cloud of suspicion that followed her to her new school all stemmed from the way her complaint had been handled. After all, what were those around her to think? It was A, not DeLuca, who had been told to leave Canadian Martyr. The truth was not the only victim in this process. A had been isolated and traumatized further.

According to A, five years later, in 1978, when she was 17, A took a night course in bookkeeping at Sault College. As it happened, DeLuca was her teacher. According to A, DeLuca asked her to remain after class on the first night of class and apologized to her for what he had done when she was younger. He explained that he had loved her then, and that he had never stopped loving her. A and DeLuca then commenced a sexual relationship which continued for several months. When DeLuca ended the relationship in January 1979, A was devastated.

DeLuca's sexual relationship with A was clearly an abuse of his position of trust and authority. A was a vulnerable 17-year-old. DeLuca was, in large part, the author of her vulnerability. It is ironic that DeLuca, the person most responsible for A's isolation through his earlier abuse, could now use that isolation to prey upon her again. And this sad affair could have been avoided. After all, White had A's note - a note that cried out for an investigation. A confirmed her abuse in person. On White's own admission, he conducted no investigation. On the contrary, he allowed DeLuca to intimidate A and her family in his presence through threatened legal proceedings.

White claims that he was in a "difficult spot" as it was A's word against DeLuca's. I can accept that White perhaps did not know who to believe. What is unacceptable is that neither the School Board authorities

nor White were prepared to find out. An inference might be drawn that their prime concern was to protect a colleague and the reputation of the school.

White admits that A's complaint should have heightened his concerns about DeLuca. He says that the demands of his job did not allow him to more closely supervise DeLuca. This misses the point. At this stage, the answer was to have the alleged abuser investigated, not merely supervised.

Instead, A was sent home from school. DeLuca remained. A was ultimately told to attend another school to "improve her school life". DeLuca remained. There was no mistaking the message: A was the problem, not DeLuca. This was the message communicated to A, who deserved better; and to DeLuca, who would only take this as a license to continue to abuse children, which is precisely what he did. Indeed, no record was kept of A's unresolved complaints. As we shall see, this facilitated DeLuca's continuing abuse.

Finally, I note that throughout this entire incident, the School Board offered no support or assistance or counselling to A or A's family.

B

B was also in DeLuca's grade seven class in 1972-1973. She was 11 years old at the time. DeLuca pleaded guilty to one count of indecently assaulting B.¹¹

DeLuca admitted that on several occasions, he took B to the principal's office and kissed her "as an adult would kiss". B recalls that she felt ill and gagged after DeLuca kissed her. She also recalls that DeLuca rubbed against her while she was seated at her desk, and his penis came in contact with her arm.

On one occasion, DeLuca asked her to remain after school. When they were alone, he took her to the back of the classroom, placed his hands

¹¹ The incidents set out below regarding B were largely admitted by DeLuca as part of the Agreed Statement of Facts. B's recollection of other incidents not admitted by DeLuca has been obtained from her police statement dated June 23, 1994 and her evidence at the preliminary inquiry.

on the wall behind her "trapping" her. B recalls being very frightened and believes DeLuca touched her.

Mary¹² was in the same grade seven class as A and B. One day, Mary was to stay over at B's house for the weekend. They planned to walk home from school together. DeLuca told B to stay in class after school. Mary was told to wait outside. After what seemed like a long time, Mary went back into the school. As she approached the classroom, she heard B "crying or whimpering". Mary entered the classroom, saw no one, but heard the crying sound coming from behind the closet doors at the back of the class. As she opened the doors, Mary saw B in the corner of the closet. DeLuca had his hand underneath her sweater and on her breast. DeLuca yelled at Mary to get out. She said she was not leaving without B and told DeLuca that she was "going to tell". B was crying and hysterical but rejected Mary's suggestion to tell Mary's father.¹³ The following day, the girls told Mary's mother what had happened. Mary's mother, in turn, told B's father. Subsequently, Mary's mother, along with other parents, complained about DeLuca's conduct at a meeting with the principal. This meeting is described below.

C

C was in DeLuca's grade seven class at Canadian Martyrs in 1973-1974. She was 12 years old. DeLuca was charged with one count of indecent assault against C and ordered to stand trial on that charge at his preliminary inquiry. As a result of plea negotiations, the Crown did not proceed with this charge.¹⁴

C's recollection is that one day towards the end of the school year, DeLuca asked her to get some supplies from the supply room located down the hall from the classroom. DeLuca followed C into the room and shut the door. C picked up some supplies and, as she turned around, DeLuca moved

¹² This is not her real name. Mary's recollection of events has been obtained from her testimony at the preliminary inquiry.

¹³ This incident was also admitted by DeLuca as part of his guilty plea.

¹⁴ C's recollection of events has been obtained from a statement which she gave to the police on June 22, 1994 and from her evidence given at the preliminary inquiry. The incident was not admitted by DeLuca.

in front of her. His hands were open and near her breasts, although she is not sure if he touched her. As she backed away, DeLuca said "I know you want it". As C left the supply room, she told DeLuca that she was going to "tell". He responded that no one would believe her.

C later told her parents what had happened in the supply room. She recalls that her mother wanted her to "just forgive and forget", but her father disagreed.

After the supply room incident, C stayed away from school for approximately three weeks. According to C, while she was home, the same truant officer who had visited A the year prior came to visit her. C recalls the truant officer telling her that DeLuca had "a family to support and it would be my fault if he lost his job"; that "he didn't actually do anything wrong"; that she should "forgive and forget"; and that if she did not go back to school she would fail the school year. C returned to school.

Here again, if C's recollection is accurate, the truant officer regarded it as her duty to dissuade C from pursuing any complaint against DeLuca. This was done through minimizing or discounting the conduct involved and making C feel guilty for any adverse consequences to DeLuca or his family should any complaint be pursued. One would have expected a truant officer, now alerted to at least two allegations by different children, to have taken some action.

Meetings with parents at Canadian Martyrs

White maintains that he does not specifically recall any incident being brought to his attention involving C or B. He admits, however, that he met with a group of parents, including A's parents and Mary's mother, in 1974. White believes that the meeting was instigated by Mary's mother, who telephoned him and requested that he get together with the parents. White recalls the parents being "pretty steamed up" and alleging that DeLuca was making inappropriate advances towards their daughters. Parents also complained that DeLuca was physically rough with the students. They wanted to know what White was going to do about this.

A's mother recalls that during the year after A left Canadian Martyrs, she and her husband attended at what appears to be the meeting described by White, and learned that DeLuca had been accused of abusing C. A's mother

recalls C's father telling White to stop covering for DeLuca, and White saying that "perhaps Mr. DeLuca was a Jeckyl and Hyde". According to A's mother, she learned at that meeting that another meeting had been held in the previous year with grade seven and eight parents at which the parents were assured that the allegations against DeLuca were nothing more than rumours fabricated by her daughter.

If this is accurate, the School Board's labelling of A as a liar in a public forum without a proper investigation of her allegations constitutes conduct deserving of strong rebuke.

White's evidence is that after his meeting with parents in 1974, he contacted "officials downtown" and informed them of the parents' concerns. Shortly thereafter, a further meeting was held in the staff room of Canadian Martyrs to discuss the allegations of sexual improprieties against DeLuca, as well as his rough treatment of students. White recalls DeLuca, his lawyer, the president of the teachers' union, Struk, Mills, Cameletti, and the Board's lawyer being present at this meeting.¹⁵

Struk's evidence is that he first became aware of complaints against DeLuca involving female students in 1974. He recalls the complaints in these terms:

[A] number of parents had complained to the principal who then informed Mr. Mills who then informed myself of two major complaints. One dealt with the rough manner in which Mr. DeLuca was handling boys, primarily when boys would be in an altercation fighting or carousing, and parents were saying he used excessive force when grabbing them and yanking them away and so on. The other dealt with females and the parents were saying that their daughters had told them that he walked up and down the aisles and looked down their blouses.

Struk remembers attending at a meeting called by Mills to discuss the complaints. The meeting was held in the gym at Canadian Martyrs. Mills,

¹⁵ At the time, Struk was the Assistant Superintendent of Schools, Mills was the Superintendent of Education and Cameletti was the Assistant Superintendent of Instruction and Curriculum at the School Board.

Struk, White, DeLuca, the Board's lawyer, and 20 or 30 parents attended. Struk recalls that "the gist of the meeting was that these were inappropriate actions on the part of Mr. DeLuca and that he would be reprimanded for that". It is unclear whether this is the same meeting at which C's parents and A's parents were present.

Subsequent to this meeting, DeLuca was verbally reprimanded. A follow-up letter was written by Mills and placed in DeLuca's file at the School Board's office. The letter is dated May 22, 1974 and reads, in part, as follows:

I recommend that you refrain from touching students, or from treating them in a rough manner. Although we all become provoked on occasion, use of physical force is probably the least effective means of helping students, and usually is more an expression of our personal frustration.

...

Some of us have more violent tempers than others; some of us express our feelings in a physical manner; others express their sentiments internally. Self-control, or a striving to achieve self-control, is essential in a teacher. Try to refrain from shouting, or other acts which intimidate some students.

Although some of the tactics which you have used, such as singling students out for weaknesses, operate well with some teachers, they have caused you some problems. Try to consider each student as an individual with feelings, and sentiments similar to those which we ourselves possess. In other words, try to put into practice the Christian principle of "doing unto others, as we would have done unto ourselves".

Some of your problems have been caused by overzealousness; try to use discretion in giving homework, assignments, projects, penalties, etc.

Regarding the accusations made by some students relating acts of discretion [sic]. I can only repeat what I stated in your presence and in the presence of the two lawyers. If the accusations were entirely lies, then I suggest that you endeavour to ask yourself why should

such statements be made about you. If there is any truth in their accusations, I can only remind you of the advice which was given to me more than thirty years ago: "Students are sacred to his teacher. [Emphasis added]

Struk's evidence is that he knew of no other complaints at this time. It was 19 to 20 years later, during the 1993/1994 police investigation that, he says, he discovered a similar complaint against DeLuca had been made by A's mother.

Here we had 20 to 30 parents who voiced their concerns to the School Board. White, who was fully conversant with A's complaint, was present. The issues raised by the parents were manifestly serious. They were plainly worried about DeLuca's inappropriate treatment of their children.

Whatever happened at this meeting, several things are clear. No investigation was ordered. The parents' complaints were not documented. A meaningful investigation might have uncovered DeLuca's sexual misconduct, hopefully resulting in his dismissal and ending the abuse. Instead, DeLuca was sent a letter.

The letter itself is also troubling. Its author, Mills, stated that, "if there is any truth" in the students' accusations, he could only remind DeLuca that "students are sacred". If Mills suspected that the accusations might be true, he ought to have heeded his own advice. His letter did not serve to protect the students. Little thought seems to have been given to the risks to which they would be subject if the accusations were true. Further, the letter appears to be deliberately vague. It gives no indication that allegation of a sexual nature were in issue. Nor does it set out what "indiscretions" DeLuca allegedly did or did not commit. Thus, as a record to be placed in DeLuca's file for future reference, it was meaningless. The result? The abuse persisted.

D

D was in grade five at Canadian Martyrs School in 1972-1973. She was nine-ten years old. D did not testify at the preliminary inquiry or

participate in the civil proceedings, and no charges were laid in connection with any incidents involving her.¹⁶

D was not in DeLuca's class. However, she recalls that one day she saw DeLuca in the hallway. He came towards her, said something to her, and touched her. She does not remember details, but remembers returning to her classroom crying, and telling her teacher about the incident. The teacher recalls D complaining to her about DeLuca.

While the teacher does not recall D saying anything that indicated abuse, she brought the complaint to her principal, White, and is quite certain that he spoke to DeLuca.¹⁷ White was not specifically asked about this incident during his examination for discovery and did not mention it when asked whether he recalled any other incidents of abuse involving DeLuca.

E

E was a student in DeLuca's grade seven class at Canadian Martyrs in 1973 - 1974. She was 13-14 years old at the time. While she was not a complainant in the criminal proceedings, she did commence a civil action against DeLuca, White and the School Board. In her statement of claim, E alleged that DeLuca committed several assaults against her, including the following:¹⁸

- (a) In October 1973, DeLuca put his hand up E's skirt in the classroom. When E told DeLuca to stop, and threatened to scream if he did not, DeLuca responded, "I can fail you and your mother would not appreciate it".
- (b) In spring 1974, DeLuca called E to the back of the classroom. He took his penis out of his pants and asked E to touch it.

¹⁶ D's recollection of events has been obtained from her police statement. The events were not admitted by DeLuca.

¹⁷ The teacher's recollection of events has been obtained from her police statement.

¹⁸ These incidents were not admitted by DeLuca.

- (c) In spring 1974, DeLuca sent E to the supply room for supplies. He followed her in and shut the door. DeLuca pushed E up against the wall, lifted her skirt, put his hands on her breasts and tried kissing her. E knocked supplies off the shelves and yelled. As she fled from the room, DeLuca told E to go to the washroom and get straightened up before she returned to the class.
- (d) As DeLuca walked by E's desk, he would often brush his genital area against her, or touch her breast. This conduct occurred on an almost daily basis during 1973 and 1974.
- (e) On two occasions during gym class, DeLuca told E to stay behind and tried to kiss her. On both occasions E pulled away from DeLuca and ran into the washroom. On one occasion, DeLuca followed her into the washroom, where he threatened her. He told her that there was nothing she could do because no matter what she said, everyone would believe him, and not her.
- (f) While DeLuca was teaching class he often stood beside E's desk and rubbed her legs. While he was teaching, he ran his pointer up E's back slowly.
- (g) On one occasion, DeLuca asked E if she "had ever sucked on a man's dick".
- (h) DeLuca called E at home on at least two occasions, and asked her to meet him. The first time, E refused. DeLuca became upset and said that he would make it difficult for her in class. The next day, DeLuca intentionally embarrassed E in front of her classmates. The second time he called her, E told him that she was going to tell her mother. DeLuca responded, "There is nothing she can do about this, they will believe me over your mother".

E further claimed that she and her mother told White, the principal of Canadian Martyrs, about DeLuca's abuse, but that White did nothing to end

it. E asserted that White told her mother that E was over-reacting, that her relationship with DeLuca was "just puppy love", and that E was just a young girl infatuated with a handsome teacher. E also claimed that White told her mother that E would not be welcome at Canadian Martyrs while DeLuca was there. The next year, E transferred to another school.

E's civil action was settled prior to examinations for discovery. Accordingly, E and White were never questioned under oath about these allegations. However, her allegations of sexual abuse are strikingly similar to others who were abused. If her allegations are true, E would represent yet another student who felt compelled to transfer to another school to avoid DeLuca and end the abuse.

According to E, DeLuca told her that "they will believe me over your mother". It is beyond dispute that DeLuca told a number of his victims that "no one would believe them". His confidence was not misplaced.

DeLuca's Transfer from Canadian Martyrs

DeLuca was transferred from Canadian Martyrs to St. Theresa School in June, 1974. According to Struk, his transfer was not because of any complaint against him, but because enrollment at Canadian Martyrs was declining and DeLuca was the junior teacher at the school.

White acknowledges that he was happy when DeLuca was transferred because the complaints had "caused quite a strain".

White had no right to be pleased when DeLuca was transferred. Another school, and more importantly, other students, would now inherit DeLuca. This "not in my backyard" attitude continued to manifest itself as DeLuca passed from school to school. Struk denies that DeLuca was transferred because of the complaints against him. Even if this is true, the Board had an obligation to ensure that St. Theresa was fully informed about DeLuca. St. Theresa's students deserved no less.

iii) St. Theresa School (1974 - 1981)

DeLuca taught grades five, six and seven at St. Theresa from September 1974 to June 1981. Frank Orlando was the principal when

DeLuca arrived. Gary Barone became principal in September 1975. According to Barone,¹⁹ when he took over as principal, Orlando did not tell him anything about DeLuca.²⁰ Barone believes that he heard DeLuca had had a problem with a student, but he was not sure exactly what it was "because it wasn't specifically spelled out to me. It was kind of secretive - not secretive, but kind of like I didn't - it wasn't my concern, because it happened in another school". Barone called DeLuca's former principal, White, and asked him about DeLuca. Barone believes he called because of what he had heard of DeLuca "through the grapevine". White recalls Barone calling because of a problem he was having with DeLuca.

White told Barone that DeLuca had experienced some problems with students at Canadian Martyrs, but did not provide him with any details. Instead, he suggested that Barone "check with the staff downtown". White understood that, had he reported the prior allegations, he would have been obliged under regulation 18(1) of the *Teaching Profession Act*, to inform DeLuca within three days of such report. To avoid this obligation, he simply referred Barone to the Board.

Struk, the then Superintendent of Schools, recalls that, in accordance with Board policy, the 1974 reprimand letter was in DeLuca's file at the School Board office and not at the school. DeLuca's new principal would therefore not have had access to the 1974 reprimand letter. According to Struk, it was his practice to provide a new principal with some background on a newly-transferred teacher. Struk does not specifically recall discussing DeLuca with Orlando but assumes that he would have done so.

I have already commented on the failure to document any allegations of abuse made against DeLuca at Canadian Martyrs. Now we see that even the May 22, 1974 letter sent to DeLuca, which was itself deficient, had not been placed in DeLuca's personnel file but sat untouched in the School Board's files. This again facilitated DeLuca's transfer to St. Theresa unencumbered by any record of the allegations made against him—or indeed, by any notation that he had been cautioned. Of course, School Board officials or White could have verbally advised DeLuca's new principal about

¹⁹ Barone's recollection of events has been obtained from his evidence at his examination for discovery in the civil actions.

²⁰ Orlando is deceased and his recollection of events is not available to us.

DeLuca's history. Did they? We know that White did not tell Barone, even when Barone asked him. As will be discussed later in this Report, White misconceived his obligation under regulation 18(1). White should have told Barone what he knew. He claims that he referred Barone to the School Board. There is no evidence that Barone followed up with the School Board or that the Board would have been helpful, even if he had. Struk can only assume that he discussed DeLuca with Orlando, St. Theresa's principal when DeLuca first arrived. The bottom line is simple. There is no documentation whatsoever indicating that anybody told the principals at St. Theresa anything about DeLuca. It would be tempting to make the point that, had Barone been fully informed about DeLuca's history, he would have reacted differently when St. Theresa students complained of abuse to him. However, as we shall see, his response to their complaints might not inspire such confidence.

Incidents of Abuse at St. Theresa School

F

F was in DeLuca's grade five class at St. Theresa in 1974-1975. She was 10 - 11 years old. DeLuca was charged with one count of indecently assaulting F, and was ordered to stand trial on it. As a result of plea negotiations, the Crown did not proceed with this charge.²¹

According to F, DeLuca often called her and other female classmates up to his desk to speak to them. DeLuca would have F sit on his lap and place his hand on her lap while he spoke to her. On one such occasion, DeLuca caressed her thigh. F says that, on another occasion, DeLuca cornered her at the back of the classroom and tried to kiss her forehead.

In 1976-1977, when F was 12-13 years old and in grade 7, DeLuca was her science teacher. F relates an incident when DeLuca suddenly came into the girls' washroom and shouted at the girls to be quiet. A girl who had just come out of a stall with her pants undone was very upset by this. Other girls complained about it to their homeroom teacher who indicated that she

²¹ F's recollection of events has been obtained from her police statement dated August 3, 1994, and her evidence given at the preliminary inquiry. These events were not admitted by DeLuca.

would speak to DeLuca. About 15 minutes later, DeLuca "stormed into" the girls' gym class and yelled at F for reporting the incident.

F and her friend G told their mothers about this incident and they, in turn, told Barone. G's mother felt that Barone did not believe the girls' story.²² In her view, "Barone was attempting to diminish the seriousness of the situation and made it look as if we were two over-protective mothers taking our children's side". She also believes that they told Barone of rumours that DeLuca had been transferred to St. Theresa because of his reputation for flirting with his female students. Barone denied the rumours and assured them that it was normal procedure to transfer teachers. He also told them that he would speak with "Kenny" and tell him to be more careful in the future so that his actions would not be misinterpreted.

Barone's evidence is that these mothers complained "that when DeLuca marked [the girls'] books he stood too close to them and made them feel uncomfortable". Barone acknowledges saying that he would speak to DeLuca about their concerns and believes that he did. His recollection is that the mothers were satisfied and did not seem overly upset.

A number of parents allege that they complained to Barone about DeLuca's conduct towards their children while he taught at St. Theresa. Barone claims no recollection of a number of these complaints. He remembers others, though his account of what was said to him differs from the recollections of others. The position of the students, their parents and Barone is detailed in the pages that follow. Certain inferences can then be drawn from the evidence.

G

G was in DeLuca's grade five class in 1974-1975 and in his science class in 1976-1977 when she was in grade seven. G did not testify at the preliminary inquiry or participate in the civil actions. No charges were laid against DeLuca relating to G.²³

²² G's mother's recollection of events has been obtained from her police statement dated July 12, 1994.

²³ G's recollection of events has been obtained from her police statement dated June 29, 1994. These events were not admitted by DeLuca.

G recalls hearing rumours to the effect that, before DeLuca came to St. Theresa, he had "flirted with some girls" at Canadian Martyrs. G enjoyed DeLuca's class at first but as the year progressed she came to realize that she "could not trust him" and should not be alone with him. She recalls several occasions when DeLuca called her up to the front of the class. He would lean back in his chair spread his legs, and have her stand between his legs. This made her feel uncomfortable. On another occasion, DeLuca summoned her to the back of the class and attempted to kiss her on the forehead.

According to G, she was called into Barone's office after her mother and F's mother spoke to him about the washroom incident. Barone told her that she had "hurt Mr. DeLuca's feelings" by telling him that she hated science, and insisted that she apologize.²⁴

H

In 1976-1977, H was in DeLuca's grade seven class. DeLuca was charged with three counts of indecent assault and one count of forcible confinement of H. He pleaded guilty to one count of indecently assaulting H "on numerous occasions".²⁵

Most of these assaults occurred in the school supply rooms. On one occasion, after sending H for some gym equipment, DeLuca came into the supply room. He then kissed and hugged H and rubbed her hips, shoulders and breasts. H left the room after someone opened the door.

On another occasion, DeLuca escorted H to the supply room, lifted her onto the counter, kissed her face and rubbed her breasts outside her clothes. When H threatened to scream, DeLuca responded, "Go ahead, no one will hear it." When she sought to leave the room, DeLuca grabbed her by her bra strap and ripped her bra. H ran home holding her bra and crying.

²⁴ Barone was not asked about this incident on his examination for discovery as G was not involved in the civil actions.

²⁵ The incidents set out below regarding H were largely admitted by DeLuca as part of the Agreed Statement of Facts. H's recollection of other incidents not admitted by DeLuca has been obtained from her police statement dated June 13, 1994, her evidence at the preliminary inquiry and her evidence at her examination for discovery in the civil actions.

DeLuca often rubbed up against H, sometimes in class, and would then say "look, H, I have to put my jacket on because look what you've done to me". H saw a bulge in his pants.

Near the end of the school year, H agreed to attend at the school one night to help DeLuca mark papers. DeLuca suggested that this would help her win the "most valuable student" award. As they entered his classroom, DeLuca started to kiss her. H ran away but DeLuca caught up with her and proceeded to toss her over his shoulder saying, "I'm going to carry you like a sack of potatoes". He then carried her down the hall, threw her on the floor, laid on top of her, kissed her face and rubbed himself all over her. He bit her chest and her vagina through her clothes. He told her to touch him. He grabbed her hand and placed it on his penis. She believes that he ejaculated. H got up, ran down the hall and went home.

H apparently did not discuss these incidents with anyone at the time. However, Ms. I recalls that she once found DeLuca and H in the supply room and another student says she witnessed DeLuca lying on top of H with his hands underneath her during a class sleigh ride.

Ms. I²⁶

In 1974-1975, when Ms. I was 10-11 years old, she was in DeLuca's grade five class. In 1976-1977, when she was 13-14 years old, she was in his grade seven class. DeLuca was charged with four counts of indecently assaulting Ms. I. He was ordered to stand trial on three of those counts and ultimately pleaded guilty to one count of indecent assault.²⁷

When Ms. I was in grade five, the entire class dressed up one day to surprise and impress their teacher. Ms. I wore a pale blue dress with polka dots. Throughout the day, DeLuca paid special attention to her, commenting on how beautiful she looked. He constantly stared, smiled and winked at her. At some point DeLuca took Ms. I into the closet at the back of the room. She

²⁶ I is referred to as "Ms. I" for easier reading.

²⁷ The incidents set out below regarding Ms. I were largely admitted by DeLuca as part of the Agreed Statement of Facts. Ms. I's recollection of other incidents not admitted by DeLuca has been obtained from her police statements dated June 14, 1994, June 18, 1994, June 19, 1994 and September 7, 1994 and her evidence at the preliminary inquiry.

had seen him do this with other students. While in the closet, DeLuca whispered compliments to her. He touched her hair, shoulders, chest and inner thighs. Ms. I felt confused, scared, and confined.

As they left the closet, DeLuca grabbed Ms. I under her armpits, lifted her high into the air and carried her around the class. Ms. I remembers the boys laughing at her. When she returned to her seat she realized that her panties were not on properly and had to be pulled up.

According to Ms. I, when she was in grade 7, DeLuca would make comments about her "nice ass" and about another girl's "big chest".

These comments are examples of statements which constitute sexual harassment. They demean and humiliate their targets. They cause embarrassment, feelings of self-consciousness and loss of confidence. Such statements uttered by a teacher to a student poison the school environment.

J

In 1975-1976, when J was nine-ten years old, she was in DeLuca's grade five class at St. Theresa School. In 1978-1979, when she was 12-13 years old, she was in DeLuca's grade eight class. DeLuca was charged with one count of indecently assaulting J. However, J did not testify at the preliminary inquiry, and DeLuca was discharged on this charge.²⁸

J says that DeLuca hugged her, squeezed her shoulders and pressed his lips against her forehead or ear. These actions were accompanied by comments like "you look pretty today", "that's a very nice dress you're wearing" or "you're a very special lady". Although this treatment may have flattered her in the beginning, it soon made her feel very uncomfortable. According to J, students who expressed uneasiness or who rejected DeLuca were treated badly.

J also says that DeLuca once asked her to accompany him to the art supply room. With the door to the room closed, DeLuca stood close to her

²⁸ J's recollection of these events has been obtained from her police statement dated June 27, 1994. These events were not admitted by DeLuca.

with his arms positioned at either side of her head. J darted out from under his arms and was allowed to leave.

J recalls that in grade eight she and two or three other girls complained to principal Barone about DeLuca. According to J, Barone warned the girls, before they even had an opportunity to describe the incident about which they wished to complain, that they had better be absolutely certain that their complaints were legitimate. J left Barone's office "feeling somewhat minimized and questioning whether my interpretations of DeLuca's actions were founded or even reasonable". Barone has no recollection of the incident.

K

In 1976-1977, when K was 12-13 years old and in grade seven at St. Theresa, DeLuca was her science teacher. DeLuca was charged with two counts of indecent assault against K. He pleaded guilty to one count of indecently assaulting K "on several occasions".²⁹

In the spring of 1977, K attended a basketball game at St. Theresa. After the game, DeLuca asked to talk to her in one of the classrooms. DeLuca shut the classroom door and, following a brief conversation, kissed her on the mouth and slid his hands under her sweater and onto her breasts. He commented, as he often had before, that she had "big boobs". K was upset and embarrassed, and asked DeLuca what he was doing. This incident ended when two male classmates knocked on the door asking for K.

K told her family about the incident and it was decided to contact the school and not the police. K's mother called one of K's other teachers. The teacher recalls receiving a complaint about DeLuca but does not recall what the complaint was about.³⁰ K believes that her sister contacted both that teacher and principal Barone. Barone is said to have told her sister that

²⁹ The incidents set out below regarding K were largely admitted by DeLuca as part of the Agreed Statement of Facts. K's recollection of other incidents not admitted by DeLuca has been obtained from her police statement dated September 13, 1994 and her evidence at the preliminary inquiry.

³⁰ The teacher's recollection of events has been obtained from an interview she gave to police on June 7, 1994.

"teachers stick together and they have a code of ethics. K would be hurt by you doing something and she would not be able to attend any other school here in the Sault".

K relates another occasion in which DeLuca, during class, placed K's hand on his penis over his clothing. She immediately removed her hand. When she did this, DeLuca laughed. K says that DeLuca made comments about her breasts, about Ms. I's ass, and about wanting to be the first male to kiss L.

K also relates an incident involving two male students who walked in on H and DeLuca while they were in the gym equipment room. These students told other students about this, and the story eventually got back to DeLuca. The boys were called into Barone's office and told that DeLuca could charge them for spreading rumours and they would never be allowed back in the school system. According to K, DeLuca threw the boys across a desk in his classroom and told them to keep their mouths shut. Barone was not specifically asked about this incident during his examination for discovery.

Barone denies ever being told that DeLuca had kissed or touched K or otherwise engaged in inappropriate sexual behaviour. He acknowledges that the teacher may have spoken to him about what he considered a "social problem" arising from the fact that K and DeLuca did not "hit it off". Barone says that all K ever told him was that she disliked DeLuca because he was strict.

K recounts telling her friend Jane,³¹ who was a neighbour of DeLuca, and whose father was a police officer, about the rumours regarding DeLuca and female students. A few days later, K was called into Barone's office. Jane and her father were there. According to K, Jane's father, who was in uniform, told the girls that they were in a lot of trouble for spreading rumours about DeLuca. Jane's father did not give a statement or provide any evidence in this matter and his recollection of these events is accordingly unavailable to us. His daughter Jane recalls being summoned to meet with Barone and DeLuca and made to apologize for a conversation she had had

³¹ This is not her real name. Jane's recollection of events has been obtained from a statement she gave to the police dated September 26, 1994.

with K and another student about DeLuca. She was informed that her parents would be sued for slander if she did not apologize. She made the apology. Barone maintains that he has no recollection of these incidents.

L

L was in DeLuca's grade seven class in 1976-1977. She was 12-13 years old at the time. DeLuca was charged with committing one count of indecent assault against L. He was committed to stand trial, but the crown did not proceed with the charge as part of the plea negotiation.³²

DeLuca was L's first male teacher. L recalls that, at the beginning of the year, she thought DeLuca was "cool" and felt lucky to have him as a teacher. Her opinion of DeLuca, however, changed within the first month. L heard that DeLuca had told some of her classmates that he intended to "teach her how to kiss". L was scared because she did not know exactly what DeLuca might do. During class one day DeLuca took L to the principal's office. As DeLuca approached L, she tripped and fell onto the floor. DeLuca tried to get on top of her. L kicked out with her feet and DeLuca jumped up. As L stood up she noticed someone at the door. She believes it was another student. L and DeLuca then left the office.

M

In 1977-1978, M was in DeLuca's grade seven class at St. Theresa. She was 12-13 years old at the time. DeLuca was charged with one count of indecently assaulting M. He pleaded guilty to the charge.³³

DeLuca frequently took M to the supply room, where he cornered her and kissed her. The first time, he told her that he just wanted to see how it felt. She told him she disliked it. DeLuca laughed and said that she would get used to it because that is how "real kisses" were. He told her that she was

³² The incidents set out below are taken from L's police statement dated June 25, 1994 and her evidence given at the preliminary inquiry. They were not admitted by DeLuca.

³³ The incidents set out below regarding M were largely admitted by DeLuca as part of the Agreed Statement of Facts. M's recollection of other incidents not admitted by DeLuca has been obtained from her police statement dated June 20, 1994 and her evidence given at the preliminary inquiry.

a special student and he trusted her not to tell anyone. After these sessions, DeLuca often said that he had to be sure to button his coat to cover himself before he went back to the classroom. DeLuca told M that she was to lick her lips when she wanted a kiss. However, it was DeLuca who repeatedly licked his lips while staring at her.

After another teacher almost caught DeLuca and M in the supply room, DeLuca started taping paper over the supply room window. When M refused to go to the supply room with him, DeLuca became angry. He told M that she and her friend would not be allowed to go on an upcoming school field trip unless she relented. M indicated that she would rather miss the field trip.³⁴

When M was in grade eight, another girl confided in her that DeLuca was "bothering" her as well. According to M, the two girls went to speak to principal Barone and told him that DeLuca "had been kissing us and making us feel uncomfortable by cornering us when we were alone". Barone asked the girls whether they were sure they knew what they were saying, and the girls said they were. M recalls that Barone then said, "Do you realize how embarrassing this can become for all of you, if it becomes public?" and "Do you realize what you can do to this man's career, if you come forward and tell anybody?". M felt that Barone "dismissed their stories as exaggeration and slander".

Barone denies receiving the complaints described by M. His evidence is that during the last week of school, M mentioned that she had gone to the supply room with DeLuca, and that he had brushed up against her. According to Barone, he asked M whether DeLuca had deliberately tried to touch her or whether it was accidental. M replied that she could not be sure. Barone's recollection is that he told M that if it was deliberate, he would act upon it because it was abuse, but he could not act if it was accidental. He maintains that he did not pursue the matter because M could not be sure whether DeLuca's conduct was accidental or deliberate.

³⁴ M believes that both students were eventually allowed to go on the field trip.

N

N was in DeLuca's grade six class at St. Theresa in 1978-1979. She was 11-12 years old at the time. DeLuca was charged with one count of indecent assault against N. He was ordered to stand trial on this count, but the Crown did not proceed with the charge as part of the plea negotiations.³⁵

According to N, one day, while she was working at the blackboard near DeLuca's desk, DeLuca told her, "you have beautiful eyes, just like the rest of your body". A second incident occurred when the class was on a sleigh ride. DeLuca grabbed N by her shoulders and pinned her down on the sleigh. He knelt beside her with his upper body on hers, and nibbled, bit and licked her ear. He then stood up and "smiled a wicked little smile". N moved away from him and sat with some friends. She did not tell any adults about the incident until she was 17 or 18, when she told her mother.

O

O was in DeLuca's grade five class at St. Theresa in 1980-1981. She was 10-11 years old at the time. DeLuca was charged with committing two counts of indecent assault against O. He was ordered to stand trial on these charges. The Crown did not proceed with the charges as part of the plea negotiations.³⁶

O recalls that, at the end of one school day, while she was cleaning the blackboards, DeLuca came up behind her and pressed the front of his body against her back. He asked if she was "horny". O said "no". DeLuca replied that he knew that she was. O felt uncomfortable. She ducked under his arm and left the classroom.

On another occasion DeLuca tickled O under her arms and on her stomach. When O did not react he asked, "Aren't you ticklish?" When she

³⁵ N's recollection of the events has been obtained from an interview she gave to police on June 9, 1994 and from her evidence given at the preliminary inquiry. These incidents were not admitted by DeLuca.

³⁶ O's recollection of the events has been obtained from an interview she gave to police on August 22, 1994 and from her evidence given at the preliminary inquiry. These incidents were not admitted by DeLuca.

replied that she wasn't ticklish anywhere, DeLuca said that he knew a spot where she may be ticklish. He asked her if he could search until he found it. O says that she felt uncomfortable with this but "laughed it off" and walked away.

These suggestive and offensive remarks are further examples of verbal sexual harassment. Remarks of this nature go to create an uncomfortable and unsafe educational environment. When nothing is done to stop the harassment, it sends a message that such conduct is accepted and tolerated by the school.

P

P attended St. Theresa in 1980-1981 for grade five. She was 10-11 years old at the time. DeLuca was her teacher for one subject. He was charged with one count of indecently assaulting P and ordered to stand trial on it. The Crown did not proceed with the charge as part of the plea negotiations.³⁷

P recalls that DeLuca would joke about the training bras worn by students. He would say, "I notice that you are wearing a bra today", and would try to guess its size. On occasion, he put his arm around P and pressed her front against his front or side. P would try to pull away, but DeLuca would continue to hold her. When she succeeded in pulling away, he pulled her back. She was uncomfortable about these incidents and felt that what he was doing was wrong. P also recalls an occasion when DeLuca whispered in her ear "nothing, nothing, nothing". When she asked him what he was doing, he said, "I'm whispering sweet nothings in your ear".

P told her mother, who was a supply teacher with the School Board, about these incidents. P's mother says that she spoke to Barone and told him that P was shy and disliked the extra attention DeLuca was giving her.³⁸ She requested Barone to keep an eye out for P and make sure that DeLuca

³⁷ P's recollection of the events has been obtained from her police statement dated August 16, 1994 and from her evidence given at the preliminary inquiry. These incidents were not admitted by DeLuca.

³⁸ P's mother's recollection of the events has been obtained from her police statement dated August 16, 1994.

stopped. According to P's mother, Barone agreed to do so. P's mother also recalls speaking to DeLuca and, while she does not remember her exact words, the message was "cease and desist". P's mother does not recall P complaining about DeLuca after she spoke to Barone. However, P's evidence is that DeLuca subsequently said "did you really think telling your mother about me would make me leave you alone?" Barone maintains that he does not recall any incident involving P and DeLuca.

DeLuca's Transfer from St. Theresa

DeLuca was transferred from St. Theresa to St. Veronica School in June 1981. Barone recalls suggesting to Struk, the Superintendent of Education at the School Board, that it might be wise to move DeLuca to another school where he could have a "fresh start". Barone acknowledges that it would be fair to say that he wanted to "get rid of" DeLuca because of the complaints. Barone believes that after DeLuca left St. Theresa he received some inquiries from staff at St. Veronica's about whether there had been any problems with DeLuca at St. Theresa. Barone believes he may have told Doug McCabe, the principal at St. Veronica, that while he had "some concerns" about DeLuca, he could not put his finger on anything specific. According to Barone, the complaints he had received about DeLuca did not cause him to conclude that DeLuca was involved in any kind of sexually abusive behaviour.

In June 1981, when DeLuca departed St. Theresa, he left behind eleven children who describe being sexually abused and harassed by him. They are identified in this Report as F, G, H, I, J, K, L, M, N, O and P. Nine of these women testified at DeLuca's preliminary inquiry. Ultimately, he pleaded guilty to offences involving four of them. The remaining charges were withdrawn pursuant to plea negotiations. No doubt, the prosecution's decision to withdraw a number of the charges was intended to spare these women the further ordeal of testifying a second time at DeLuca's trial. As earlier indicated, the prosecution did not concede that any of the withdrawn charges were unfounded. On the contrary, the allegations contained in those charges are strikingly similar to those which DeLuca formally admitted.

Barone recommended that DeLuca get a "fresh start" at another school, thus enabling Barone to "rid himself" of a problem teacher. This practice, known in educational circles as "passing the trash", permits sexual predators to slip away from one school and hunt again at another.

White, the principal at Canadian Martyrs found it fortuitous that DeLuca was transferred to another school, though purportedly that transfer was unrelated to DeLuca's misconduct. Here, the transfer was effected because DeLuca was a problem. Either way, the result was the same: the continuing abuse was facilitated.

"Passing the trash" necessarily involves non-disclosure. The recipient of the "trash", in this case, St. Veronica, was not told exactly what it was getting. Barone says he may have advised St. Veronica's principal that he had "some concerns" about DeLuca but could not put his finger on anything specific. Assuming that this undocumented conversation did take place, it effectively told the new principal as little as possible.

Barone claims no recollection (or a conflicting recollection) of a number of complaints described by DeLuca's students or their families. Barone maintains that the complaints he did receive did not lead him to conclude that DeLuca was a sexual abuser. This is hardly surprising. On Barone's own evidence, he never conducted or directed an investigation of any complaints. At most, he would speak to DeLuca about a complaint. Barone made assumptions about the validity or seriousness of the complaints. He told M that she must be sure that DeLuca's conduct was deliberate for him to act. In so saying he misconceived his responsibilities. This was a school, not a court of law. Unless he could be certain that DeLuca had done nothing wrong, his duty was to initiate an investigation. Children under his care as St. Theresa's principal were potentially at risk.

DeLuca's students and their families tell a very different story than Barone about how he responded to their complaints.

F, G, J, K, M and P or their parents all describe complaints they made to Barone about DeLuca. These complaints were made at different times and by different families. Accordingly, one would have thought that Barone had the benefit of the prior complaints when evaluating each complaint which followed. J recalls that she was accompanied by three or four other girls. M was accompanied by another girl. F and G's mothers were greeted with scepticism. Their concerns were minimized. Rumours about DeLuca were denied. Adding insult to injury, G was directed to apologize to DeLuca for some childish slight. J and her fellow students were told that they must be absolutely certain that their complaints were legitimate. K's sister was told that teachers stick together and that a

complaint would damage K and prevent her from attending school anywhere else in the Sault. Boys who had repeated rumours of K's abuse were told that DeLuca could press charges against them. K and Jane were called into Barone's office, with Jane's father, a police officer, present and told they were in trouble for spreading rumours about DeLuca. Jane was told to apologize or face a lawsuit for slander. M and her companion were asked if they were sure. They felt their complaints were dismissed as exaggeration and slander. Barone queried whether they recognized the embarrassment this would cause them and the potential effect on DeLuca's career. P's mother was told that Barone would "keep an eye" on DeLuca. DeLuca confronted P with her complaint.

These accounts sound all too similar to the recollections of the students at Canadian Martyrs and their families. If accurate, they show that complaints were minimized or discounted. Children were greeted with doubt. They bore the burden of demonstrating DeLuca's wrongdoing. The threat of lawsuits or criminal proceedings was used to silence them. The effect on their own futures and that of DeLuca was raised to further dissuade them from pursuing their complaints.

On the uncontested evidence, a clear picture emerges. A number of children did not remain silent. They courageously came forward with their complaints. However, the complaints were dismissed or mishandled. No investigation was conducted. It may well be that others were dissuaded from coming forward with their accounts. DeLuca got his "fresh start" at St. Veronica — and the abuse continued unabated.

iv) St. Veronica School (1981-1985)

DeLuca taught grades five and six at St. Veronica School from 1981 until June, 1985. When DeLuca arrived at St. Veronica, Doug McCabe was the principal and Dwight McFarlane the vice-principal. In 1984, Ray Mask became the principal. When Mask succeeded McCabe as principal, he met with McCabe for approximately one hour. Mask does not recall talking about DeLuca with McCabe or any other Board officials, or reviewing DeLuca's file. Mask does recall that, prior to DeLuca's arrival at St. Veronica, he heard "rumours" about DeLuca having had "personality clashes with parents", but

he heard nothing about DeLuca sexually or physically abusing students.³⁹ As far as Mask was concerned, DeLuca was just another teacher at his new school.

At that time, Struk was the Superintendent of Education at the School Board. He was from time to time assigned supervisory responsibilities at St. Veronica. The incidents set out below relate to events that occurred at St. Veronica while Mask was the principal.

Incidents of Abuse at St. Veronica School

Q and R

In 1984-1985, when Q was 13-14 years old, she was in the Learning Exceptionalities III class ("LEIII"), a special education class for students with special needs. DeLuca was Q's gym teacher. DeLuca was charged with four counts of sexual assault against Q. He pleaded guilty to one count of sexually assaulting her "on several occasions".⁴⁰

DeLuca would often put his arm around Q's shoulder and then put his hand against the side of her breast and move his fingers across her breast. Q initially thought that the contact was accidental, but gradually came to realize that DeLuca was intentionally touching her breast.

On one occasion in gym class, Q accidentally hit another student in the groin with a floor hockey ball.

DeLuca took Q into the gym equipment room. He put Q up against the wall, with his hands on both sides of her head. He then pressed his knee

³⁹ Mask's recollection of events has been obtained from his evidence given at his examination for discovery in the civil actions.

⁴⁰ DeLuca admitted to the incidents of abuse regarding Q and R set out below, but not to the events surrounding the investigation, which have been gathered from Q's police statement dated June 20, 1994, her evidence given at her examination for discovery in the civil actions, R's police statement dated June 29, 1994, Q and R's evidence given at the preliminary inquiry, R's evidence at her examination for discovery in the civil actions, and the documentary record, as well as the recollections of other individuals involved, as indicated below.

into her groin, and rubbed his knee against her vagina. DeLuca asked Q, "How would you like it if this was done to you?" Q was very upset by this incident.

When R was 13-14 years old, she was also a student in the LEIII class in 1984-1985, and DeLuca was her gym teacher. DeLuca was charged with one count of sexually assaulting R, and one count of touching her for a sexual purpose. He pleaded guilty to the one count of sexual assault.

DeLuca would also often put his arm around R and slip his hand onto her breast. As a result, R sought to stay away from DeLuca as much as possible. After R witnessed DeLuca take Q into the equipment room following the floor hockey game incident, R convinced Q that they should tell someone what was going on. They decided to speak to their teacher, Brenda MacKay.

Ms. MacKay recalls five students in her LEIII class, including R and Q, speaking to her about DeLuca.⁴¹ According to the girls, they told her that DeLuca had been molesting them and touching them where they did not want to be touched, such as on their breasts. Q also told MacKay about the floor hockey incident. Two boys in the class told Ms. MacKay that they had seen DeLuca molest the girls.

The Investigation

Ms. MacKay contacted principal Mask, and conveyed the girls' concerns.⁴² Mask asked her to record the students' complaints in writing, which she did. Mask then called Struk, and arranged to meet with him and John Cameletti, the Director of Education, the next day. At this meeting, Mask outlined the procedure he intended to follow in investigating the complaint against DeLuca. Mask suggested that he and MacKay meet individually with the students and interview them. MacKay and Mask would then meet with the students' parents. Later that morning, Struk instructed Mask to have the vice-principal, McFarlane, attend the interviews in place of

⁴¹ Brenda MacKay's recollection of events has been obtained from a statement she provided to police on July 11, 1994.

⁴² A report prepared by Mask regarding this incident summarizes what followed.

Ms. MacKay. Struk also directed Mask to ask the parents not to initiate any action against DeLuca until the Board's investigation was complete. Struk's evidence is that he did so on the advice of counsel.

The Interviews

Mask and McFarlane interviewed students over two days. Their recollections of those interviews differ from one another and from that of Q.⁴³ According to Mask, he and McFarlane interviewed the five students mentioned in MacKay's report, including Q and R. Mask does not recall if they interviewed other students in the LEIII class as well. While Mask's evidence is that he does not specifically recall what Q said during the interview, he recalls that he asked Q if "DeLuca had ever touched her breasts" and "if he had ever touched her inappropriately in any other areas". He says that Q responded "no".

Q, however, says that she told Mask that "DeLuca...cornered me in the equipment room, put his legs - put his knee in my vaginal area and was yelling at me, and scared me, and that he had been touching my breasts".

McFarlane's evidence is that he and Mask interviewed all of the students in the LEIII class. His recollection of their interview with Q is that Q told them that DeLuca had accused her of deliberately trying to injure a student by kneeing him in the groin, and when she denied it, DeLuca ordered her to go to the girls' change room, where he asked her how she would like it if someone had done that to her. He then made a kneeing motion towards her groin. Based on the interview with Q, MacFarlane did not believe that there was contact between DeLuca's knee and Q's groin. According to McFarlane, Q said nothing about DeLuca touching her breasts.

McFarlane admits that R told them that DeLuca had taken her "into the main hall of the school at one time...and at some point in time that he had touched her breast". She also mentioned that during gym classes, he frequently tapped students on the buttocks with a plastic floor hockey stick. McFarlane, however, did not believe that R was telling the truth about DeLuca touching her breast, because "that incident was to have occurred in

⁴³ McFarlane's recollection has been obtained from his evidence given at his examination for discovery in the civil actions.

the main hall of the school....which is extremely accessible to the whole student body. It was near a washroom that is used an awful lot, and R's anger seemed to be more based on the fact that DeLuca had called Q a liar during the floor hockey incident". McFarlane did believe that DeLuca hit the girls in the buttocks with hockey sticks. According to McFarlane, none of the boys supported Q or R's complaints. The boys simply said that DeLuca played too roughly during gym class.

The Investigation's Conclusion

Mask believes that, as part of the investigation, he reviewed DeLuca's file to ascertain information as to his record at previous schools. He found that it contained nothing other than classroom visitation summaries. Accordingly, throughout the investigation, Mask had no knowledge of the letter of reprimand dated May 22, 1974, from Superintendent Mills that was in the School Board's central file. Furthermore, Mask's evidence is that neither Struk nor Cameletti ever informed him of any other complaints about DeLuca. Mask did not contact any previous principals to determine whether similar complaints had ever been lodged against DeLuca elsewhere. The investigation appears to have consisted entirely of student interviews.

The conclusions of the investigation, as summarized in the report, are as follows:

1. At no time did Mr. DeLuca touch a girl on the breast.
2. Most students admitted being hit on the backside with a plastic hockey stick during floor hockey games.
3. When female students had to be spoken to, Mr. DeLuca did not always speak to them privately in the sports room. When he did the door was always open. The students stated that Mr. DeLuca also spoke to female students in the hallway and in a corner of the gym.
4. Female students were hugged during physical education periods by Mr. DeLuca however all the girls stated and the boys concurred that the girls also went to Mr. DeLuca and hugged him.

The report continued:

It is the feeling of Mr. McFarlane and I, that many of the complaints of the students were unfounded. We also feel however, that Mr. DeLuca, as a professional, used very poor judgment in dealing with some of the situations which occurred during physical education lessons.

Mr. McFarlane and I, as a result of our investigation, are satisfied that nothing of a serious nature occurred and we do not feel it necessary to pursue the issue any further.

Follow-up to the Investigation

After completing the investigation, Mask and McFarlane attended at the Board's offices and informed Struk and Cameletti of their conclusions. The next morning, Struk, Mask, McFarlane and MacKay met with DeLuca at St. Veronica School. Struk informed DeLuca that Mask and McFarlane had conducted an investigation into sexual allegations made against him during his physical education classes. Struk advised that the investigation had concluded that the actions complained of had not taken place, but that DeLuca had behaved in a less than professional manner. Mask read out the contents of his report.

There is no indication that anyone asked DeLuca whether he had committed any of the acts that gave rise to the complaints. DeLuca seemed upset, but did not say anything. McFarlane stated that MacKay said something at the conclusion of this meeting to the effect that, "I hope you are right". Mask arranged to meet with DeLuca the next day to review the guidelines for teaching physical education classes. MacKay, however, notes that DeLuca did not teach her class physical education following the investigation. According to Mask, he may have stopped teaching the class "because it was at the end of the school year and we had a lot of outdoor track and field activities and the annual play day so physical education classes sort of ceased". MacKay subsequently told the police that she considered the Mask report to be "misleading and incorrect" and that she did not believe the students' complaints were fabricated or unfounded.

The students' parents were not informed of the allegations against DeLuca, the investigation or its conclusions. Mask believes that the School Board's lawyer told him that the parents should be dealt with after the investigation. Once the investigation was completed and the conclusion reached that the allegations were unsubstantiated, Mask did not feel it necessary to contact the parents.

Mask did not place a copy of the report in DeLuca's file at the school. When DeLuca was subsequently transferred, no evidence of this report followed him. Mask recalls sending a copy to the School Board, specifically to John Cameletti. Cameletti acknowledges that while he must have received the report (as the document indicates), he does not recall receiving it nor does he recall the incidents that gave rise to the investigation.⁴⁴

During the police investigation in 1994, the only located copy of the 1985 report was one kept by Mask in his personal files. He gave this copy to DeFazio, the Superintendent of Personnel, who forwarded it to the police. None of the members of the School Board were able to explain why no copies of the report were found in the Board's files. It would appear, therefore, that the report was either lost over the years or destroyed.

Mask undertook to investigate these allegations and apparently recognized the importance of conducting separate interviews of the students in DeLuca's class. Unfortunately, there were a number of troubling aspects to the investigation. It should not have been confined to student interviews. The allegations were never put to DeLuca; indeed, he learned of them only after the investigation had been completed. Q's complaint was dismissed because it purportedly was not re-asserted in her interview; R's complaint was re-asserted but disbelieved nonetheless. Ms. MacKay, who had discussed the complaints with each of the girls, was not further consulted or invited to intervene as a support person for the complainants. No record of the interviews was preserved. Recollections differ on what was and was not said. We do not know if the interviewing process was in any way flawed. DeLuca has since admitted that Q and R were both abused by him.

⁴⁴ Cameletti's recollection of events has been obtained from his evidence at his examination for discovery in the civil actions.

Mask obtained no information about DeLuca's prior history. Surely, the complaints would not have been dismissed so quickly had this history been known. As we have seen, DeLuca's file at St. Veronica was bare. It told Mask nothing. However, Struk and Cameletti were brought into the St. Veronica investigation. They were aware of prior complaints against DeLuca. They knew about the May 1974 letter of reprimand. Struk knew why DeLuca was transferred to St. Veronica. According to Mask, Struk and Cameletti told him nothing. The fact that students at different schools had made similar complaints against the same teacher was of critical importance in evaluating where this investigation should go. Conversely, treating each complaint in each school as an isolated allegation virtually ensured that each complaint would go nowhere.

Having completed this investigation, Mask chose, in my view, incorrectly, not to tell the parents about the complaints or the results of the investigation. The investigative report did not even make its way into DeLuca's file.

DeLuca's Transfer from St. Veronica

DeLuca left St. Veronica in June 1985 to teach high school at Mount St. Joseph College. Mask's evidence is that the transfer had nothing to do with the allegations or investigation and had been arranged prior to these events having occurred. Mask assumes that he would have sent DeLuca's file to Mount St. Joseph College. However, not only did the Mount St. Joseph file not contain the Mask report, it contained no record of the investigation having taken place.

v) Mount St. Joseph College (1985-1988)

DeLuca taught at Mount St. Joseph College from September 1985 to June 1988. His wife was also a teacher there. Sister Anne Cosgrove was the principal in 1985-1986, and Sister Leona Spencer the principal thereafter. Sister Spencer's evidence is that she was not provided with any information about DeLuca when she took over from Sister Cosgrove.⁴⁵

⁴⁵ Sister Spencer's recollection of events has been obtained from her evidence given at her examination for discovery in the civil actions. Sister Cosgrove was not examined for discovery and her recollection of events is accordingly not available to us.

Incidents of Abuse at Mount St. Joseph

S

In 1987-1988, when S was 14-15 years old, she was a grade nine student at the West Campus of Mount St. Joseph College. DeLuca was charged with one count of sexual assault against S and was ordered to stand trial on it. However, as part of the negotiated guilty plea, the Crown did not proceed with this charge.⁴⁶

Although DeLuca was not S's teacher, her locker was located near the teachers' staff-room, and she often saw and spoke to DeLuca in the hallway. S characterizes their conversations as "very flirtatious". DeLuca asked her whether she liked his clothes and the way he wore his hair; he teased her about boys her own age and asked what she saw in them. S recalls that DeLuca encouraged her to take a class with him and assured her that she would do well and her marks would be high.

According to S, shortly before the Christmas holidays, DeLuca told S that he was taking a trip with his family to Florida. He put his arms around her and said, "Wouldn't it be nice, wouldn't you like to take that trip with me?". One day, as she was bent over beside her locker to put on her boots, DeLuca tapped her on her buttocks. He gave her a smile and a wink and walked into the teachers' staff-room.

As a result of her interaction with DeLuca, S developed a "crush" on him. She proceeded to telephone his home several times in February and March 1988, and would hang up whenever someone else answered. DeLuca contacted the police, who traced the calls to S. The police contacted S's family. In May, 1988, S was charged under the *Criminal Code* with making harassing phone calls. She signed an Alternative Measures Agreement,⁴⁷ and agreed to write a letter of apology to DeLuca.

⁴⁶ S's recollection of events as set out below has been obtained from her police statement dated November 11, 1993 and her evidence given at the preliminary inquiry. These incidents were not admitted by DeLuca.

⁴⁷ This is an agreement entered into whereby measures other than judicial proceedings under the *Young Offenders Act* (R.S.C. 1985, c. Y-1) are used to deal with a young person alleged to have committed an offence.

According to S, she and DeLuca did not communicate while the police remained involved. However, a few days before he received the letter of apology, DeLuca commented "Oh, I'm going to run home and check my mailbox now and see if I got your letter". S's recollection is that DeLuca acted as though the situation was a big joke. DeLuca later told her that it was a very nice letter. At the end of the school year, DeLuca came into S's typing class. He hugged her in a "warm compassionate way" and told her, "Don't worry. I will teach you one day."

Sister Spencer recalls that DeLuca told her about the calls. Sister Spencer and the vice-principal, Sister Murphy, agreed that because the calls had taken place outside of the school, there was no need for the school to become involved in this situation.

The principal and vice-principal felt that there was no need for the school to be involved in this situation. I disagree. The fact that one of their students was charged criminally with harassing one of their teachers raised issues of concern to the school. They would have been better advised to determine what had led up to these events. This determination may or may not have exposed DeLuca's abuse. Even without knowing about his abuse, the situation suggested that S might require guidance or counselling.

DeLuca's Transfer from Mount St. Joseph College

In June 1988, DeLuca transferred from Mount St. Joseph College to St. Mary's College. According to Sister Spencer, DeLuca's transfer was unrelated to the incident involving S. It came about because St. Mary's College was a larger school and DeLuca's career could be better advanced there.

vi) St. Mary's College (1988-1994)

DeLuca taught at St. Mary's College from September 1989 until his arrest in June 1994. Harvey Barsanti was the principal during this time.⁴⁸ Barsanti did not speak to the principal at Mount St. Joseph College about DeLuca when he was transferred. According to Barsanti, he did not know

⁴⁸ Barsanti's recollection of events has been obtained from his evidence given at his examination for discovery in the civil actions and his police statement which is undated.

DeLuca personally, nor had he heard of any allegations of sexual abuse. He had heard rumours that DeLuca was "a bit of a womanizer". Barsanti was told by a vice-principal at St. Mary's that DeLuca "could be trouble on staff, that he caused some trouble on an elementary staff that he was on and that he was involved in some kind of situation with the wife of one of St. Mary's current staff members". DeLuca's teaching certificate constituted the only document received by St. Mary's on his transfer there.

Barsanti engaged in no meaningful screening process to learn about his new teacher. As we have seen, this represented a systemic problem common to all of the schools to which DeLuca was transferred. Barsanti had heard rumours about DeLuca that might have motivated him to make more direct inquiries about DeLuca. In fairness to Barsanti, no one should have expected him to act on rumours only. Mere rumours should not permeate a teacher's file. However, DeLuca's history contained more than rumours. After all, he had been the subject of specific complaints, a caution to refrain from physical force in 1972, the May 1974 letter of reprimand and the 1985 investigation. None of this appeared in his file as it was transferred from school to school. The importance of a complete and accessible record is made manifest by the circumstance of DeLuca's continued abuse.

Incidents of Abuse at St. Mary's College

T

T attended grade nine at St. Mary's College in 1988 - 1989. She was 14-15 years old at the time. DeLuca was her typing teacher. DeLuca was charged with two counts of sexual assault against T. He pleaded guilty to one count.⁴⁰

DeLuca came up behind T while she was typing and touched her in ways that she found offensive. DeLuca massaged her shoulders while she was typing and slipped his hand down the front of her blouse so that his fingers were on her breasts, almost to her nipples. DeLuca made comments

⁴⁰ The incidents set out below were admitted by DeLuca as part of the Agreed Statement of Facts. The facts surrounding T's disclosure of these incidents have been obtained from her police statement dated June 24, 1994, her evidence given at the preliminary inquiry, and her evidence given at her examination for discovery in the civil actions.

to T about her looks, and on one occasion, ran his tongue over his lips and winked at her.

T recalls that the first time DeLuca touched her breast, she told her mother. After the second such incident her mother suggested that she speak to the principal, and T did so. She recalls telling Barsanti that DeLuca was "hitting on her" and touching her. Barsanti asked her if she was sure, and she responded that she was. According to T, Barsanti did not believe her and told her that he had received no other complaints about DeLuca. T told Barsanti that she did not want to be in DeLuca's class anymore. Barsanti told her that if she dropped out of the class, she could consider herself "no longer a student at St. Mary's College". T continued attending DeLuca's typing class. However, after a few more such incidents, she decided not to return to the class and therefore lost the credit. The next semester, she transferred to another school. Barsanti denies receiving a complaint from T about DeLuca.

The factual narrative relating to St. Mary's College is all too familiar. DeLuca picked up at St. Mary's where he left off at St. Veronica's. Some students did not remain silent. In fact, a number of students or their families describe complaints directed to St. Mary's principal, Barsanti. Barsanti's account of what was said to him, if anything, often differs from their recollections.

There is no doubt that T was sexually abused by DeLuca. The conflict is whether Barsanti was told about it. If T's evidence is accurate, Barsanti was specifically told about the abuse. Like others, he did not conduct any investigation or report the complaint to police or Children's Aid. Moreover, he allegedly compelled T, upon pain of expulsion, to return to DeLuca's classroom, where she was again abused. This certainly would explain why T left the class and the school.

U

U attended grade nine at St. Mary's College in 1988-1989. She was then 14 years old. DeLuca was her typing teacher. DeLuca was not charged with any criminal offences involving U.⁵⁰

⁵⁰ U's recollection of events has been obtained from her police statement dated November 12, 1993. These incidents were not admitted by DeLuca.

U recalls that within the first month of school, DeLuca began massaging her shoulders during typing class. She found this offensive and told him to stop. According to U, DeLuca constantly harassed her after this incident and yelled at her during class or in front of her peers. She felt that she could do nothing right in his eyes. She failed the course.

U repeated the typing course at night school in the next semester. DeLuca was again her teacher and, she says, subjected her to the same abuse and harassment. During her typing exam, DeLuca picked up the exam sheets on which she was working, inspected them, shook his head and put the sheets down to the side. U felt that she must have been wrong in these portions of the exam, so she redid them, and did not finish the exam. She failed the course again.

According to U, her parents spoke to principal Barsanti about DeLuca. However, nothing was done because he "did not think there was cause for anything to be done".

U's mother indicates that she spoke to Barsanti three times about U's problems with DeLuca.⁵¹ Although Barsanti assured U's mother on each occasion that he would look into the matter, nothing was done. Eventually, U's family transferred her to another school because they felt that her concerns were not being addressed at St. Mary's.

Barsanti's evidence is that he met with U and her parents once in 1988-1989 because U had failed her typing exam. U's parents were upset. They felt that there was a "personality conflict" between DeLuca and U as a result of which DeLuca was treating U unfairly. Barsanti recalls U stating that she was "uncomfortable" with DeLuca "hovering around her desk" and, at one point, when he put his hand on her shoulder, she told him "to bug off". Barsanti asked U's father "if we were dealing with something more than a conflict", and whether the family wished him to involve the police. According to Barsanti, U's father said "no", indicating that he believed the police would not do anything about it. Because of the Us' concern, Barsanti arranged for the department head to give U another exam, which she also failed.

⁵¹ U's mother's recollection has been obtained from her police statement dated November 12, 1993.

Barsanti says that he did not feel it necessary to report U's complaint to his supervisor, since he viewed the matter as "a personality conflict" and not one of sexual harassment or abuse. He did not find the complaint concerning DeLuca hovering around U's desk disturbing because "that's what keyboarding teachers do".

U's parents repeatedly spoke with Barsanti. According to them, they specifically complained that DeLuca had abused their daughter. It would be redundant to say how such a complaint compels reporting and further investigating. However, Barsanti says that their complaint did not specify abuse. Even assuming that Barsanti is correct, his position remains problematic. First, abuse might not be suspected where a complaint is framed only as a "personality dispute". But here, on Barsanti's own evidence, U told of her discomfort with DeLuca "hovering" around her desk. To dismiss this complaint as unfounded because that "is what keyboarding teachers do" demonstrates a lack of awareness of how students articulate their own abuse at the hands of teachers, and of the classic warning signs of such abuse. That is not to say that Barsanti was expected to definitively know that U was abused, based upon her stated sense of discomfort. The point is that the matter warranted further inquiries. Instead, nothing was done.

S

As previously outlined, S had been in DeLuca's grade 9 class at Mount St. Joseph College in 1987-1988.⁵² In 1989, when S was 16 years old, she attended a night typing course at St. Mary's College taught by DeLuca. S recalls that during her first class, DeLuca embarrassed her by singling her out in front of the class and announcing that she "wasn't a good student". The next night, DeLuca met her at the classroom door. He was very angry. He told her that she had no idea what she had put his wife through with her phone calls, and told her to get out of the class. She recalls him "screaming" at her to leave, which she did.

⁵² The events set out below have been taken from S's police statement dated November 11, 1993 and her testimony at the preliminary inquiry. These incidents were not admitted by DeLuca.

S was nonetheless determined to take the course. To achieve this, her mother contacted Ms. Doe, the night school co-ordinator, to complain about what had happened. DeLuca subsequently resigned as the typing teacher, and S resumed the course. The events leading up to DeLuca's resignation from this position are set out below.

Ms. Doe⁵³

Ms. Doe was the co-ordinator of community schools and continuing education for the School Board from 1976 to 1992. DeLuca pleaded guilty to one count of sexually assaulting Ms. Doe.⁵⁴ This complainant obviously stands in a different position than the other complainants. She was an adult colleague of DeLuca.

According to Ms. Doe, she received separate complaints in 1989 about DeLuca from U's mother and S's mother. U's mother told her she was concerned that DeLuca was sexually harassing her daughter; that "everybody knew he was a pervert"; and that he "would come up behind [students] as though he was going to put his hands on the typewriter keys, but he would then go down and touch their breasts". U's mother told Ms. Doe that because U had stopped DeLuca from doing this to her, "he was jerking around with her grades". Ms. Doe's evidence is that she immediately notified her supervisor, John DeFazio, of the complaint, and was advised to have the Us call Barsanti, the principal of St. Mary's College. Ms. Doe conveyed this advice to U's mother. According to Ms. Doe, U's mother told her sometime later that she and her husband had spoken to Barsanti, but nothing was being done.

Ms. Doe recalls that, in the fall of 1989, S's mother reported S's problems with DeLuca to Ms. Doe. Although Ms. Doe had some difficulty understanding exactly what S's mother was saying, she understood that S's mother was concerned about DeLuca "coming on" to her daughter. Ms. Doe

⁵³ Consistent with the treatment of the other victims, Ms. Doe's name has been changed for the purposes of this Report.

⁵⁴ Ms. Doe's account of events has been obtained from her police statements dated November 9, 1993 and April 10, 1994, her evidence at the preliminary inquiry, and her evidence in her libel action against Struk and the School Board.

reported this to DeFazio and was told to "investigate it further and get back to him". Ms. Doe spoke to both S's mother and S. She was told that DeLuca had been flirting with S and coming inappropriately close to her. This had led to some problems between them, and DeLuca would not allow S to attend his typing class.

Ms. Doe also recalls speaking to Fred Mills, the Superintendent of the School Board, about DeLuca in the 1970's. According to her, Mills said that he was concerned about DeLuca "molesting girls" but could not "catch him".⁵⁵

Ms. Doe reported S's mother's concerns to DeFazio and, in addition, told him that she did not want DeLuca teaching in her night school program. She believes DeFazio told her that he would ask DeLuca to resign from the program, but that she should discuss the matter with him and his brother Wayne (who was a School Board trustee) and Barsanti.

A meeting amongst these parties took place on October 18, 1989. Their recollections of what occurred at the meeting differ significantly.

According to Ms. Doe, prior to the meeting, she went to DeLuca's office to speak privately with him about his behaviour towards female students. During their conversation, and after telling her that he was "just a big friendly guy", DeLuca grabbed Ms. Doe in his arms and, with his knees splayed, pulled her tight to his body while he made rutting motions with his pelvis against her private parts.⁵⁶ Ms. Doe became very angry. She demanded to know why he did these things to women. She recalls that he then began crying and said "I'm going to get fixed". Ms. Doe left saying that she would see him at the meeting.

Ms. Doe recalls that, at the meeting, DeLuca aggressively denied having any problem with female students. Ms. Doe then confronted him with what he had done to her minutes before. DeLuca again began crying. Ms. Doe's evidence is that his brother expressed concern about how their sister

⁵⁵ Mills died in 1978 and his account of these incidents is not available to us. The outline of Mills' alleged involvement should be viewed in this context.

⁵⁶ This assault was admitted by DeLuca as part of the Agreed Statement of Facts.

and mother would be hurt by this, and about problems DeLuca had previously had at other schools.

According to Ms. Doe, Wayne DeLuca told her that "they" would handle the situation. Ms. Doe insisted that DeLuca at least seek psychiatric help. When DeLuca indicated that he would not see a psychiatrist in Sault Ste. Marie, Ms. Doe recommended one in Michigan.

Shortly after the meeting, Ms. Doe wrote three letters describing the meeting: one to Barsanti, one to DeFazio, and one to DeLuca. Her letters make no specific reference to any allegations of assault or harassment by DeLuca on female students. Ms. Doe's letter to DeLuca is dated October 20, 1989 and reads as follows:

In regard to the issues discussed over the past week in meetings, and individual conversations between yourself, Mr. Harvey Barsanti, Mr. Wayne DeLuca, and myself, I wish to offer some pertinent comments. For the most part, the comments will be directed at those issues discussed in the meeting held Wednesday, October 18, 1989, at St. Mary's College, between yourself, Mr. Barsanti, Mr. W. DeLuca and myself.

It is my opinion as a result of this meeting, and the circumstances that led to that meeting, that you have, however, innocently, adopted a pattern of mannerisms and behaviours as a teaching professional that attract and involve you in difficult situations with selected students. This pattern, and the resultant reactions, both on the part of the student and yourself, seems likely to continue unless it is actively addressed. It is my opinion, further, and as a result of our meeting October 18, that this problem could be successfully addressed by an active effort on your part.

You will recall that the problem involve both the perception of the student to yourself as an individual, and the further perception of the student to yourself as a teacher.

Several solutions to this problem were discussed during this meeting, one of which was an opportunity for you to consult with a knowledgeable professional which you may wish to take advantage of at some time. Other

solutions and possibilities were discussed. A further suggestion could be the Employee Assistance Program that our Board has instituted, should you so choose.

You may be assured that your teaching skills, organization, and attention to the subject matter and academic skills are, in my opinion, excellent. However, it is my opinion that the interpersonal patterns, as we have discussed, compromise the effectiveness of that teaching at times.

I have enclosed a copy of the letter I have addressed to my supervisor, Mr. DeFazio, to inform him of the steps taken to address the perceived problem, and I hope this is to your satisfaction.

I sincerely hope you will take definite steps to prevent the eruption of any similar situation of this nature in the future for the sake of both yourself as a teaching professional, your students, and those of us who are concerned. [Emphasis added]

According to Ms. Doe, sometime later, she spoke to DeFazio, who told her that the situation was being handled, and to DeLuca's brother who told her that the situation was none of her business.

According to Barsanti, the purpose of the meeting was to deal with S's complaint and Ms. Doe's concern that "there was more to Kenny's involvement with S than met the eye". In addition, Ms. Doe proposed to use the meeting as an opportunity "to suggest to DeLuca that he might have a problem in how he deals with the students, possibly giving them the wrong impression and getting himself into hot water over it". Barsanti acknowledges that he too had concerns about DeLuca's behaviour. Ms. Doe had informed him of rumours about DeLuca, and they had discussed DeLuca's reputation as "a womanizer".

Barsanti's evidence is that Ms. Doe was "very careful how she put her concerns to Ken" at the meeting. According to him, Ms. Doe suggested that "because he's good looking and outgoing...students could get the wrong impression of how he might be acting towards them and he could get himself into difficulty with it". DeLuca and his brother acknowledged that DeLuca had been in trouble before because his interaction with students had been misunderstood.

Barsanti also recalls Ms. Doe's suggestion that DeLuca consider obtaining professional help, and DeLuca and his brother's response indicating that "they would get some advice or counsel".

According to Barsanti, Ms. Doe informed Barsanti about the incident in DeLuca's office, but Barsanti says, "she didn't appear to be telling me that she had been assaulted. She didn't come down in an indignant way, at least that was my perception at the time. It was almost funny that he would behave like this in these circumstances".

Barsanti recalls that, following the meeting, he was concerned about DeLuca as a teacher. He felt that DeLuca had to be very careful in his dealings with female students. However, he did not think that S and U's complaints involved sexual abuse or harassment.

John DeFazio, who was a Superintendent with the Sault Ste. Marie Separate School Board,⁵⁷ recalls receiving a complaint in the fall of 1989 from S's mother through Ms. Doe. The complaint was to the effect that DeLuca had been rude to S and had told her that he did not want her in his class. DeLuca insisted that he would not teach S. When DeFazio told him that he had no choice, DeLuca withdrew as a night class teacher.

According to DeFazio, he only became aware of the October 18, 1989 meeting a day or two later, when Ms. Doe informed him that she had met with DeLuca, his brother and Barsanti to discuss "DeLuca's arrogant style" and his yelling at S in front of the night class. DeFazio was unhappy that this meeting had been held without his knowledge. Ms. Doe also told DeFazio about how DeLuca had "hugged" her, but he said that she laughed about it at the time.

Wayne DeLuca was a trustee with the Sault Ste. Marie School Board from 1975 to 1991.⁵⁸ According to Wayne, he was unaware of any previous allegations against DeLuca. He recalls the meeting in October 1989, which

⁵⁷ DeFazio's recollection of events has been obtained from his undated police statement, and his evidence given at his examination for discovery in the civil actions.

⁵⁸ Wayne DeLuca's recollection of events has been obtained from his police statement dated April 20, 1994 and his evidence given at the examination for discovery in the civil actions. To avoid confusion, Wayne DeLuca is referred to as "Wayne" in this narrative.

he says began with a discussion about S: the "young lady ... was infatuated with Ken. Ken would not allow her in the class and the parents wanted her to get the credit so that she could graduate". Wayne recalls no mention by Ms. Doe of other problems involving DeLuca or of any allegations of sexual abuse or misconduct of that nature. Ms. Doe told him that S's parents lived in his ward and were planning to contact him.

According to Wayne, Ms. Doe told his brother something to the effect that "you're a very good looking guy. I think you've got a nice body and the girls find you attractive, and I'm not sure that you can deal with that". While he recalls Ms. Doe mentioning that DeLuca should consider talking to a doctor, he says that DeLuca denied having a problem. Wayne states there was never an agreement that DeLuca would seek professional help. It was left that DeLuca and Ms. Doe would discuss his resignation. Approximately two weeks after the meeting, Ms. Doe called Wayne with the name of a doctor in Michigan. She indicated that she had given his brother the same information. Wayne maintains that he has no recollection of Ms. Doe alleging that she had been attacked by DeLuca prior to the meeting.

Libel Actions

In September 1994, after charges had been laid against DeLuca, Ms. Doe appeared on a Sault Ste. Marie news television program. During the program, she alleged that she told School Board officials about DeLuca's sexual abuse of students in 1989 and that the Board failed to take action. The story also alleged that Ms. Doe and another person who had complained to School Board officials about DeLuca were threatened with lawsuits if they continued voicing their complaints. In response to these allegations, the School Board commenced a libel action against Ms. Doe and the television station.

The action against the television station was settled quickly. As part of the settlement, Struk appeared on a news broadcast in November 1994 to respond to the allegations that Ms. Doe had made about the School Board's handling of the DeLuca matter. During this broadcast, Struk denied that Ms. Doe had told any School Board members in 1989 about alleged sexual misconduct by DeLuca. In addition, Struk stated that had Ms. Doe known of any assault, she was obligated to report the incident to the Children's Aid Society or the police. In response to this broadcast, Ms. Doe commenced her own libel action against Struk and the School Board. The School Board's

libel action against Ms. Doe was settled prior to trial. Her libel action against the School Board and Struk proceeded to trial before a judge and jury in January 1999. The action was dismissed. The jury found that the words spoken by Struk and complained of by Ms. Doe were true.

There are significant credibility issues over the conversations which Ms. Doe had with other school officials about DeLuca. These spilled over into the various libel actions and cannot (and need not) be resolved by me. Obviously, if Ms. Doe was told that S and U were sexually abused, she had a duty to report that abuse to the authorities, and particularly so, once advised that Barsanti had not acted. Any officials to whom she may have reported that abuse had corresponding duties as well. However, Ms. Doe's letters written after the October 18, 1989 meeting make no direct reference to complaints of sexual abuse but suggest that DeLuca may have innocently become involved in difficult situations. The content of these letters no doubt fuelled the Board's later position in responding to Ms. Doe's libel action that Ms. Doe did not tell Board officials that two students had been abused.

The credibility debate between various school officials over what was and was not said about DeLuca highlights the systemic issue earlier identified. Where abuse is suspected or raised, such discussions need be documented and the documentation preserved.

Mills allegedly expressed concern that DeLuca was abusing children but that the Board could not "catch him" at it. This is a theme that also finds expression in Barsanti's evidence. If the Board or its officials waited for incriminating evidence to fall into their laps rather than proactively investigating suspected abuse, and if Barsanti and others did not recognize incriminating evidence when they saw it, it is no wonder that they thought they could not catch LeLuca. They could not catch him, assuming they wanted to, because they chose not to investigate further.

Other inference: are available on the evidence. A number of Board officials or employees may have been uninterested in exposing DeLuca. It might be inferred that this is the real reason why complaints were dismissed or minimized; alleged abuse and harassment were characterized as misunderstandings or personality conflicts; and why inaction was rationalized on the basis of insufficient evidence. One inference available on the evidence is that school officials or employees suspected DeLuca's abuse

and refrained from making further inquiries out of loyalty to a colleague or concern for the reputation of their school system.

Meanwhile, there appears to have been little thought given to the ongoing risk to other students in DeLuca's classes. History repeated itself as students were compelled to leave and DeLuca permitted to remain.

V

V attended St. Mary's College from 1988 to 1990. DeLuca was charged with one count of counsellelling a young person to have sexual intercourse, one count of counsellelling a young person to touch for a sexual purpose, and one count of sexual assault all in connection with V. He pleaded guilty to the latter two counts.⁵⁹

V was in DeLuca's grade 11 business class in 1988 - 1989. She was then 16-17 years old. DeLuca often "flirted" with her during class, commenting, for example, on her beautiful eyes. Once, he asked if she would like to go into the back room with him. V treated the comment as a joke and ignored it. Before the final exam, DeLuca told V that she would get a high mark if she slept with him. V's response was that she would rather use her brain.

In 1990, when she was 18 years old, V was in DeLuca's Information Processing class. DeLuca again flirted with her, complimented her, and asked her if she liked what he was wearing. V was engaged at the time, but DeLuca repeatedly asked her why she wanted a boy like her fiancé when she could have a man like him. He told her "you need an experienced man like me to please you" and "just name the time and the place and you know I'll be there, just say the word". V recalls frequently skipping school to avoid seeing DeLuca.

In January 1991 V, who by this time had quit school, decided to return to St. Mary's and apply for admission to the school's co-op program. She spoke to DeLuca, who was one of the teachers responsible for the program. He told her that he would "definitely" get her into the program if

⁵⁹ The events regarding V were admitted by DeLuca as part of the Agreed Statement of Facts.

she slept with him. V told him that she had a boyfriend. He assured her that no one would find out; since he was married they would both need to keep it quiet. As DeLuca spoke he stepped towards V and pinned her arms to her side. He kissed her on the mouth and rubbed his body against her so that she could feel his erection. When he stopped, he asked her if she liked it. V told DeLuca she had to go. She went downstairs crying and in shock.

DeLuca's comments to V constitute a form of "quid pro quo" harassment. This occurs when a student is led to believe that in order to participate in a school activity she must submit to a teacher's sexual demands. Such conduct is obviously incompatible with a safe and comfortable learning environment. Of course, DeLuca's assaultive behaviour amounted to a crime.

W

W did not give a statement to the police or testify at the preliminary inquiry. She was contacted by the police but indicated that she did not wish to become involved in the case. The facts surrounding the incidents relating to W were obtained from the evidence given by Barsanti and Struk at their examinations for discovery and from notes made by Struk documenting these events.⁶⁰

In the fall of 1991, W was 17 years old and in DeLuca's grade 12 class at St. Mary's.

Barsanti's evidence is that W complained to him about DeLuca in November or December 1991. She told him that DeLuca, having asked her to stay after class, put his arms around her and kissed her. When DeLuca released her, she ran out of the room. She was very frightened. Barsanti arranged to meet with W and her parents the next morning. His evidence is that he intended to call the police.

On the following day, W came to see Barsanti alone, without her parents. She told Barsanti that she had lied about the incident so as to get back at DeLuca for ignoring her. Barsanti told her that he believed her

⁶⁰ These incidents were not admitted by DeLuca.

original story and did not accept her recantation. With W still in his office, he called her mother and expressed this view. Her mother's response was: "do as my daughter tells you". Barsanti again made it clear to W that he did not believe her recantation. He told her that if she continued to maintain that she had lied, he would have to act as though the incident never happened.

It was Barsanti's belief at the time that DeLuca had somehow "gotten" to W and convinced her to change her story and withdraw her complaint. Barsanti told this to Struk who, according to Barsanti, told him that other than trying to have W "sign off" on her recantation, there was not much else Barsanti could do.

According to Struk, he and Barsanti were very concerned about the incident because it involved "a sexual situation". They discussed the matter "at great length" and "investigated the possibility of Barsanti approaching the police". Struk says that he encouraged Barsanti to suggest to W's family that they contact the police. Struk himself did not contact the police because he believed W "would deny anything occurred".

Barsanti's evidence is that after this incident he wanted "to catch DeLuca". He spoke with his vice-principals and the general feeling was that "we had to get someone that was willing to go the distance. We couldn't deal with rumour. We had to deal with fact".

We know that W did complain of sexual abuse by DeLuca. She appeared frightened. Barsanti found her complaint credible and did not believe her subsequent recantation. Further, he told Struk. Nobody went to the police, purportedly because W was likely to deny everything. If Barsanti and Struk believed that W had been abused, did they consider what else was happening in his class? What support were they offering W? What thought did Barsanti give to what had happened to the other students whose names had previously come up? What thought did Struk give to what had happened to all the students whose names had emerged throughout DeLuca's 20 years of employment? The answer to all of these questions is the same. Barsanti and Struk acted as if they were powerless to do anything unless they were presented with evidence which met courtroom standards. At best, this attitude represented some misguided notion of their powers and responsibilities. At worse, it demonstrated an approach which put the school's reputation and legal exposure ahead of their students' safety.

X

X was in DeLuca's grade 12 word processing course in 1991. She was then 17 years old. DeLuca was charged with one count of sexually assaulting X and one count of sexually touching her. He pleaded guilty to the count of sexual assault.

At the beginning of the year when students were selecting computer passwords, DeLuca told X to pick "sex" as her password. From time to time, DeLuca rubbed her arm, neck and shoulders during class, and would stare at her chest when he spoke to her. He would also press his pelvic area into her back while she was sitting at her computer. One day while X was completing an application form for a school co-op program, she asked DeLuca what she should list as her "assets". DeLuca responded, "put down that you have a nice ass, nice tits and you would be a good lay".⁶¹

X recalls that, towards the middle of the term, while X was taking a test, because of her bad back, she began typing with one hand and holding her back with the other. DeLuca approached her and told her to stop. She nevertheless continued typing in this fashion. DeLuca then became very angry. He threw a chair out of his way, shut off X's computer, and told her that her mark on the test was zero. X left the class, and went to see her counsellor in the school office. While she was with the counsellor, DeLuca came into the office screaming at her and "coming after her". X was crying and terrified. The counsellor grabbed X to protect her while the vice-principal grabbed DeLuca's arm and held him back.

A short time later, and probably as a result of this incident, X and her parents met with Barsanti and DeLuca. According to X, she told Barsanti and her parents how DeLuca had harassed her. She specifically told them about the password, the co-op form, and the touching incidents. At that point, Barsanti asked DeLuca to leave. X says Barsanti then told her and her parents that because X did not have any witnesses, his "hands were tied".

⁶¹ The foregoing incidents involving X were admitted by DeLuca as part of the Agreed Statement of Facts. The remainder of the incidents described below were not admitted by DeLuca but have been obtained from X's police statement dated June 29, 1994, her evidence given at the preliminary inquiry, and her evidence given at her examination for discovery in the civil actions.

There was nothing he could do about the situation. If the family did anything, he said they would be sued for slander and her father would lose everything. According to X, Barsanti told them that DeLuca had a very powerful union behind him. He added that the family should not say anything about the incident because it would harm the school's reputation. According to X, Barsanti also said that all he could do was tell DeLuca to stay away from her. In the face of these threats, X's family felt that there was nothing they could do. Following this meeting, X says she was required to drop out of the class and lost the credit.

Barsanti acknowledges meeting with X and her parents but, according to him, the meeting dealt with "a student-teacher conflict" relating specifically to X's complaint that DeLuca "was picking on her, that he was treating her unfairly, that he was not sensitive to her back problems, was not understanding of her absenteeism because of her back, and was on her case a lot". Barsanti denies that X complained about DeLuca making physical contact with her, but admits she told him about DeLuca's co-op application comments. Barsanti believed X and asked her and her parents "what do you want done with this?" He indicated that DeLuca's co-op remark was certainly inappropriate and that the school could investigate it further. According to Barsanti, X's response was "I want to be out of that class and I want him to leave me alone". Barsanti said that he would remove X from the class and tell DeLuca to avoid further contact with her.

Barsanti denies X's allegations to the effect that he told her family the following: not to tell anyone what happened so as to protect the reputation of the school; not to pursue a case against DeLuca because of his powerful union backing; that it would be X's word against DeLuca's; and that they could face lawsuits or criminal charges for slander.

Barsanti's evidence is that, by the time he heard of X's complaints, he had already developed great concerns about DeLuca's behaviour. Barsanti did not report his meeting with X's family to the Board because "the meeting was about her attendance and lack of performance" and it was not his policy to report such matters to the Board. He acknowledges subsequently speaking to DeLuca but, because he considered the problem a teacher-student conflict, he did not reprimand DeLuca.

This time, Barsanti states that X made no complaint of physical contact. He regarded X's situation as a "student-teacher conflict". As for DeLuca's comments about X's co-op form, he regarded the remark as inappropriate but did not investigate further due to X's desire to simply be left alone. So, X was removed from the class.

DeLuca's comment to X that she should list her assets as "a nice ass, nice tits and a good lay" on the co-op form constituted classic sexual harassment. Like U's earlier "personality conflict with DeLuca", Barsanti was all too ready to characterize X's situation as merely a "student-teacher conflict". He was not prepared to reprimand DeLuca because this was merely a "conflict". Barsanti concedes that he had now developed "great concerns" about DeLuca's behaviour. Yet, no children were warned; no parents were consulted; no Board officials were advised; and no support was provided to X. Coming after complaints had been made by others, including a specific complaint of abuse by W, one can only infer that Barsanti was prepared to rationalize why no action could be taken against DeLuca.

Contrary to Barsanti's position, X and her parents maintain that Barsanti was told everything. Barsanti provided a lot of reasons why nothing could be done—the absence of witnesses, the powerful teachers' union, a potential suit against X and her family for slander and the potential harm to the school's reputation. None of the reasons could justify a failure to act—decisively and quickly—to protect DeLuca's students.

Y

In 1992, Y attended DeLuca's business course at St. Mary's College. She was 18 years old. DeLuca was charged with, and pleaded guilty to, one count of sexually assaulting Y.⁶²

DeLuca told Y that she was beautiful, that her relationship with her boyfriend was "puppy love", and that she could not experience a real man until she experienced him.

⁶² The incidents involving Y were admitted by DeLuca as part of the Agreed Statement of Facts. Y's recollection of events has been obtained from her police statements dated November 10, 1993 and June 15, 1994 and from her evidence at the preliminary inquiry.

One or two months into the semester, DeLuca proposed that he and Y meet somewhere and have an affair. He assured her that his wife and Y's boyfriend would never know of it. Y says she told DeLuca that she "felt sorry" for his wife.

On the day DeLuca made this proposal, he dismissed the class early and asked Y to stay behind. Once the other students had left, he shut the door and put his arms tightly around Y, pressed his lower body against her groin area, and kissed her on the lips.

Y recalls that, a few days later, Y, accompanied by a friend, spoke to Barsanti. Barsanti told her that he would speak to DeLuca but not mention Y by name, and that the harassment would stop. Y was not satisfied with this response. She told Barsanti she wanted him to go to the School Board. Barsanti told her that he would speak to her at the end of the school year about writing something to take to the School Board. In her police statement, Y states that Barsanti also told her that "her best bet was to go to the police". At the preliminary inquiry, Y's evidence was that she brought up the subject of the police, and told Barsanti that she intended to complain to them. Barsanti responded, "well, if that's what you are going to do, then do it".

Barsanti acknowledges that when Y spoke to him, she was upset and complained about DeLuca's comments, about his "hitting" on her, and about his having put his arm around her or hugged her or touched her leg. He does not recall Y saying that DeLuca had kissed her. According to Barsanti, he immediately told Y to call the police. Y's response was that she was in her final year and did not wish to go through this process while still in the school. She would consider bringing a complaint after graduation. Barsanti recalls telling Y that unless she was prepared to "go the limit on this", there was nothing he could do. He knew the police would not charge DeLuca unless she was prepared to lay charges. He recalls also that Y did not want him to say anything to DeLuca about her. Barsanti assured Y that he would inform the School Board, and would mention to DeLuca that he had received some complaints about his comments to girls but would not identify Y as a complainant.

Barsanti subsequently told DeLuca that he had received a couple of complaints about his comments to girls. He cautioned DeLuca to be careful

because his comments could be taken in the wrong way and cause him trouble. He made no mention of Y.

Barsanti's evidence is that he told either Struk or DeFazio about Y and the fact that she did not wish to pursue her complaint through the School Board and had rejected his suggestion to go to police. He was told that he had basically done what he could, and that if Y was not prepared to go to the police or lay a charge, there was not much more the School Board could do. The only other guidance or advice he received was to "be vigilant" and "to keep an eye on DeLuca and to report anything that might occur that would be suspicious". DeFazio and Struk's evidence is that they were not told about the Y incidents until after DeLuca was charged.

Barsanti recalls that, after Y spoke to him, he had grave concerns about DeLuca. He says he was just waiting for information that he "would be able to deal with" and was hoping that the next girl who came forward would be prepared to "go the limit with it". Barsanti's evidence is that he believed that the school counsellor was also concerned about DeLuca at that time. He knew that a number of students had spoken to her and was hoping that she would inform him what they had said so that they could initiate an investigation into DeLuca's conduct.

Now we see that Y also complained to Barsanti. The complaint was of sexual abuse. Barsanti's response included a discussion with DeLuca that he should be careful because his comments could be misconstrued. Barsanti even knew that complaints may have been received by the school's counsellor. It is difficult to understand why he left it there, waiting for someone to "go the limit".

F. The Police Investigation

i) DeFazio meets with Sgt. Duguay

Sometime in mid-1992, Ms. Doe brought up the subject of DeLuca with her supervisor, John DeFazio. DeFazio recalls that Ms. Doe likened DeLuca's situation to that of another teacher then being investigated by police for sexually abusing students. She told DeFazio that there was "more to the S and U situations than met the eye". According to DeFazio, this surprised him because he thought these matters had long since been settled.

He also says this was the first time he was made aware that they may have involved sexual improprieties.⁶³ He assured Ms. Doe that he would look into the matter, as he was concerned.

Ms. Doe claims that she had told DeFazio in 1989 that she felt DeLuca was engaged in inappropriate conduct with female students. When she met with DeFazio in June 1992, she indicated she would bring her concerns to the Board. DeFazio suggested that this would likely get her into trouble because she had failed to report the alleged abuse to the Children's Aid Society ("CAS") in 1989. Ms. Doe told DeFazio that she had been unaware of her legal duty and would inform CAS immediately. She maintains that DeFazio prevented her from calling CAS from his office by grabbing the phone and that CAS later that day declined to take her report because the students involved were over sixteen years of age.

Shortly after meeting with Ms. Doe, DeFazio reviewed DeLuca's personnel file at the board office and read the 1974 reprimand letter written by Mills. DeFazio then called Barsanti and inquired about U's complaint. Barsanti described the complaint as DeLuca standing close to U, which compelled her to tell him off and to think that he might be looking down her blouse. Barsanti also indicated that U's parents did not want to report this to CAS and that U was permitted to rewrite her typing exam, which she again failed. According to DeFazio, Barsanti did not inform him (nor did he know) of any other complaints of sexual impropriety he had received about DeLuca.⁶⁴

On June 6, 1992, DeFazio met with Sgt. Neil Duguay of the Sault Ste. Marie police. DeFazio says that he gave Sgt. Duguay the names of Ms. Doe, U and S, and Barsanti and told him about the 1974 letter of reprimand, but did not give him a copy at that time.

There is no evidence that Duguay spoke with Barsanti about DeLuca.

⁶³ According to him, in 1989, Ms. Doe had only told him that the grandparent of an unnamed St. Mary's student had complained about DeLuca failing the student on a typing exam. He had suggested that Ms. Doe have the family contact the principal, Barsanti.

⁶⁴ Barsanti was not asked about this conversation on his examination for discovery in the civil action.

DeFazio recalls that Sgt. Duguay contacted him a few weeks after their initial meeting and told him:

One, everybody looked fine. He didn't see that there was going to be any investigation...And two, that there would be a record of my report at the police station.

DeFazio says he informed Struk that Duguay had indicated there would be no investigation.

DeFazio's evidence suggests that he understood that Duguay had investigated his report of possible sexual misconduct towards students by DeLuca and determined that it did not warrant further investigation. However, Sgt. Duguay's evidence is very different.⁶⁵

Sgt. Duguay recalls an initial meeting with DeFazio. DeFazio asked for advice respecting a situation which had developed between two employees, DeLuca and Ms. Doe. Duguay recalls informing DeFazio that the police were not interested in becoming involved as no crime had apparently been committed. If either party had a complaint of criminality, the police would be willing to become involved.

Sgt. Duguay recalls that sometime later, he met DeFazio at a coffee shop. DeFazio indicated that "both people had been talked to" but that he was not entirely sure what their status was and wondered if the police wanted to get involved. Duguay recalls advising DeFazio, in similar terms to his earlier conversation, that the police would only get involved if a complaint was made.

Although Sgt. Duguay was a youth officer when he spoke with DeFazio, his recollection of the meetings does not indicate that DeFazio mentioned any incidents involving students.

ii) Y meets with Inspector Pozzo

In December, 1992, Y and her friend attended a Sault Ste. Marie police station to complain about DeLuca. They spoke to Inspector Barry

⁶⁵ Sgt. Duguay's recollection of events has been obtained from his will-say statement.

Pozzo. Both Y and Pozzo recall that Y disclosed that DeLuca had kissed her against her will. Y was very upset and wanted something done. They discussed the fact that it was just her word against DeLuca's. Y recalls that Pozzo said that Y should find other girls willing to come forward if she wished to pursue charges. Pozzo says that he advised Y that charges could be laid, but that without any other witnesses, it would boil down to her word against his.⁶⁶ According to Pozzo, Y then said that she had heard of other girls who might be willing to come forward. She indicated that she would try to get their names and would return if any of them were also interested in pursuing the matter.

Y recalls that she could not find other girls willing to speak out, so she assumed that the case against DeLuca was "at a dead end" until the police contacted her during their subsequent investigation in 1993.

Y had disclosed DeLuca's sexual abuse to the police. She was told to find corroborating evidence or other girls willing to pursue charges. It was not Y's duty to investigate her own complaint or to seek out other complainants. That was the police's responsibility. As later events demonstrate, had they conducted a thorough investigation, it would almost inevitably have uncovered DeLuca's abuse of students.

iii) The 1993 Investigation

In late October and early November, 1993, the Sault St. Marie police were separately contacted by Ms. Doe and John DeFazio respecting DeLuca. An investigation commenced which ultimately resulted in criminal charges against DeLuca. Again, there is conflicting evidence as to how this investigation was brought about, which is unnecessary to resolve here.

In October, 1993, Ms. Doe states that she consulted a lawyer to assist her with certain issues she had with the Board. When she described the incidents involving U and S, the lawyer advised her to report these matters to the police. Sometime later, on November 9, 1993, Ms. Doe met with Sgt. Frost. The next day, she presented him with a written report summarizing the complaints she had heard regarding DeLuca, and her own complaint arising out of the October 18, 1989 incident in DeLuca's office.

⁶⁶ Inspector Pozzo's recollection of events has been obtained from his willsay statement.

According to Ms. Doe, during the October-November time frame, she advised Barsanti that there was going to be a police investigation of DeLuca and expressed her wish that he tell the truth about what he knew. They spoke about the various students who had complained and whether Barsanti or DeFazio would be in trouble for failing to report the complaints to the CAS.

Barsanti says that in October, 1993, Ms. Doe met with him. She expressed the hope that he tell the truth about DeLuca. According to Barsanti, Ms. Doe held up a manila envelope, indicating that "I've got tapes here of girls that are prepared to take Kenny to task...I'll be retiring at the end of this year, but before I go I'm going to get DeLuca and I'm going to get DeFazio." Barsanti says that he informed the School Board that Ms. Doe supposedly had these tapes of students claiming to have been assaulted and indicated that "they should call the police and let them know that she's making these allegations about Ken". He believes it was DeFazio he spoke to.

DeFazio confirms that he received this information from Barsanti and contacted the police, again requesting that they investigate DeLuca. Sgt. Don Blair, another Sault Ste. Marie officer, was assigned to investigate. DeFazio gave him the names of Ms. Doe, Barsanti, S and U.

DeFazio says that he called Barsanti on October 23, 1993 and told him to expect to hear from Blair. Barsanti then attempted to contact the president of the Ontario Elementary Catholic Teachers' Association (OECTA) for advice because Barsanti and DeLuca were both members of this union. He received advice from a union lawyer on "what or how far do I go in answering [Blair's] questions".

Barsanti met with Detective Blair. He recalls that he told Blair about his conversation with Ms. Doe and about the incidents involving U and S. According to his notes, Barsanti "informed the Detective that both cases were dealt with according to board policy and they were concluded satisfactorily. The parents of Y did not want to pursue it further." When Detective Blair asked Barsanti about any other incidents regarding DeLuca, Barsanti mentioned W's complaint and subsequent recantation. Barsanti's notes reflect that he told Blair that "Mr. DeLuca was going to press charges [respecting W] but also decided against it" and that DeLuca had an "excellent rapport with his students" and "fine teaching skills". The notes conclude as follows:

The end result was that the Detective felt that he did not have enough to go after [Ms. Doe]. He felt that she has not suggested that [DeLuca] had sexually assaulted anyone [so] that no crime was suggested. He said that they would wait to see if they would hear from [Ms. Doe].

Barsanti cannot explain what he meant by this entry. He claims that it reflects what Blair said to him. Barsanti also says that Blair did not indicate that he had information supporting a belief that Ms. Doe was acting improperly so as to warrant charges or an investigation of her. Barsanti claims that he would have told Blair that he was very concerned about the allegations made against DeLuca and that he hoped that, through the information provided to Blair, the police would get the information from Ms. Doe and continue with their investigation.

Despite Barsanti's lack of explanation, the notes appear to focus on whether the evidence supports a charge against Ms. Doe for alleging that DeLuca had committed sexual assault. If such a conversation took place, even before Blair had heard directly from Ms. Doe or investigated the validity of allegations against DeLuca, it indicates that Blair's investigation was already misdirected and its priorities skewed. If Barsanti voiced his concerns about DeLuca and the need for his conduct to be investigated, his own notes do not reflect it.

DeFazio says that Detective Blair contacted him on October 26, 1993, advising that DeLuca would not be investigated because there was "too much innuendo and too much vagueness".

All the more reason to investigate the matter properly by speaking directly with the complainants and determine the true facts.

According to DeFazio, he remained concerned and asked the police to "take another look" at investigating DeLuca. DeFazio was advised that another complaint had been received (presumably from Ms. Doe) and that Sgt. John Frost had been assigned to further investigate DeLuca.

As previously indicated, Sgt. Frost met with Ms. Doe on November 9, 1993. Three days later, he interviewed DeFazio and obtained DeLuca's personnel file at the Board pursuant to a search warrant. It contained the

1974 reprimand letter. It did not contain Mask's report. Indeed, the police remained unaware of the 1985 allegations and investigation at St. Veronica's (though they had interviewed both DeFazio and Struk) until Q contacted the police in June, 1994. After that, Mask's report, found only in Mask's personal files, was given to the police.

On June 15, 1994, DeLuca was arrested and charged with offences involving seven students. Two weeks later, charges involving seven more students were laid. In October, 1994, additional charges were laid as more witnesses and complainants came forward. As indicated earlier, on April 9, 1996, DeLuca pleaded guilty to, and was convicted of, 14 offences for which he received a sentence of 40 months.

G. The Parole Board Hearing

On July 24, 1997, the National Parole Board conducted a hearing on an application made by DeLuca for unescorted temporary absences and day parole. DeLuca was then serving his penitentiary sentence. DeLuca was questioned by the Parole Board. The following are excerpts taken from the edited tape of the proceedings which has been made available to this review.

DeLuca was asked to explain his motivation in sexually abusing students. In response to a question as to how his abusive behaviour began, he replied:

I was in need for power and control, big time. As I've indicated, I came from a background where I had a lot of difficulties because I lived in an atmosphere of power and control and I think it was a learned behaviour, and when I got into the teaching profession — after a year, two years, you start to become very confident and competent, I believe, and I found myself in a position where I can manipulate these students, excuse me, and my power and control issue surfaced. I used my position....[I] had these people manipulated into believing that I could basically do no wrong, and I used every technique possible to manipulate their way of thinking...

From my point of view, I tried to persuade myself to believe that I was doing what the children wanted. You try and say to yourself, you know, you know she's not

loved at home so I'll show her some of the love she's not receiving in the house, and through your power and control that you have over these kids, and you have an unbelievable amount of power, at that, in the formative years, over elementary school kids, and I just worked that to the limits and, meanwhile, I was fooling myself or unconsciously believing that — it was me that was being satisfied, not the students.

DeLuca acknowledged that he had come from a good Italian Roman Catholic family and that he had never been sexually abused himself. He was asked how, in light of his favourable background, he could resort to assaulting young children. He answered:

The explanation I can give for that is that when you've basically lived in an environment in which you didn't experience much of life in that, up to the day I got married...I had no sexual experience...when I first sprung out and had an apartment after that, this is, you know, I was looking for something and I wasn't the type of individual that was going out into bars looking or going out, you know, that type of thing...my students were available to me at that time and there was nothing, you know what I'm saying. Maybe I'm not explaining it properly, but that's what was available to me in a way of.

DeLuca agreed that he had engaged in the abusive conduct for which he had pleaded guilty and described the conduct, in part, as follows:

Okay, touching of breasts was the most frequent. Most of them, the breast touching acts were...I would try and make it look to them like it was an accident, like an accidental brush or bump or, you know, the elbow in the arm, you know, and different reaching for a book or, you know, and then as I became more confident and continued to groom the individual, then I got a little more aggressive and then I would touch maybe a shoulder, down the front of the chest - external, on top of the clothing, I would, there were hip touches you know, butt touches. In one instance... there was a touch beneath the clothing of the young female...

I think she didn't resist because she was probably fearful...she definitely wasn't allowing me to do it

willingly. When I look at it in retrospect, she was doing it probably because she was in fear afraid of you know what the teacher can do, you know, students have that feeling and teachers can command that power that if you, if you basically don't do what I say, there are consequences, and she must have - she was a very mature girl...And she was quite grown up for her age, phrase it that way, and so she probably, she was afraid of me, probably afraid that if she went forward and - as what happened very soon after - and wasn't believed, and so her, uh, when I look back at it now I just have a look at she didn't go forward at that time because of that. She did go forward later but I believe her fears were realized very soon after.

I'd kiss the students, cheeks, lips. In one case, with the adult, I hugged her, I kissed her and I pulled her up tight to my body and I guess, basically, I put her right up against my body...

When he was asked about how he chose his victims, he said:

Each one of them, they came from a low to moderate socioeconomic background. All... were very, very bright, academically strong students, and that's probably why I could - I look at it now in retrospect - that I could give them the additional chores to do. They'd be out of the class and still keep up with the work they were missing while they were out. Each of them was physically mature for their age...they were not weak personality-wise. As a matter of fact they were very strong, very very strong individuals in that respect but where they were, but one of the other similarities was that in most every case they came from an immigrant family. Sault Ste. Marie is a very highly ethnic Italian with immigrant rules and the theory that the teacher is right, still exists in many of these schools and where I taught in the Italian district... most or all knew me personally from me being a child in that area....I had credibility with the parents and I think the children I assaulted knew that so that's why they probably didn't go.

DeLuca admitted that when he did not get what he wanted from a student or a student did not co-operate, he reacted by threatening them with the removal of something which he knew they wanted or by intimidating and

humiliating them. “[W]hat I did”, he said, “was I put the fear of the Lord in them, and then they would comply”.

DeLuca apparently had no preference for victims of a particular age. He would exploit students at whatever grade level he was teaching. He was asked:

Now the majority of the ones you were convicted of were young, 10 to 13. You went from assaulting pre-teens to teens to this adult. You're all over the map here. Do you have a preference? Why do you think you were assaulting all these age groups?

He replied:

The availability. When I taught grade five, I assaulted grade five. When I taught grade seven, I assaulted grade seven. When I taught grade 13, I assaulted grade 13 and it's - I'm sure that I would not have assaulted those 16- or 17-year-old girls in secondary school had I still been teaching elementary school, it would have been elementary victims....I chose them because I had power or was in that position because I was in that controlled environment, maybe that's the best way of phrasing it.

When DeLuca was asked the following question:

Did you ever feel sorry for the victims when you committed your offences, when you were actually doing it or shortly thereafter. Did you feel any type of remorse or regret or did you just feel self-gratification - at the time, I'm talking about?

He responded:

At the time I felt self-gratification because it would give me - the term, it would give me a good feeling, uh, give me a high, I don't know if high - that's not the right term, I would feel good. That's all it would take would be a touch to satisfy me sexually.

The Parole Board, indicating that it had doubts about DeLuca's credibility, denied his application.

H. The Impact of DeLuca's Abuse on the Victims

The impact of the abuse perpetrated by DeLuca is set out in individual mental health assessments of the victims conducted by psychiatrists and psychologists for the purpose of the civil proceedings, and in other evidence produced in those proceedings. My discussion of the impact on the victims will necessarily be in general terms so as to avoid the possibility of identification of any particular victim.

The individual assessments conducted by the mental health professionals offer detailed accounts of the long-term and short-term consequences of the sexual abuse, as well as the current psychological functioning of each individual. It is to be kept in mind that the trauma suffered by sexual misconduct victims varies considerably across individuals and is dependent on a number of factors, such as, severity of the abuse, duration, intrusiveness, injury, the relationship of the perpetrator to the victim, use of threats, the emotional vulnerability of the victim, self-blame, age and previous victimization. The responses of others, such as, teachers, family members and the legal system are also significant factors to be taken into account. When a victim is disbelieved, blamed for the abuse, penalized for telling, or left feeling vulnerable to further abuse or retaliation, the effect is plainly negative. On the other hand, when the victim is believed, supported, protected from further contact with the abuser, and helped to feel safe, the response can have a healing affect. While the impact will vary from person to person, it is not necessarily correlated to the severity or intrusiveness of the sexual behaviour. The context of the abuse and the pre-abuse relationship to the abuser together with the other factors mentioned are equally if not more significant in determining the seriousness of the impact. A seemingly minor incident of sexual touching by a teacher or other trusted adult can result in a profound and lasting impact.

The victims in this case reported experiencing a range of consequences of the abuse including low self-esteem, depression, emotional and mental distress, nightmares, difficulty in developing meaningful and healthy relationships, inability to trust other individuals, flashbacks, alienation from parents and other family members and an inability to concentrate. Because DeLuca was a teacher, some victims developed a discomfort with formal schooling and a perceived limitation on career opportunities. Consequences of this nature are reported in the literature on

the subject, which will be discussed in chapter III of this Report, as being consistent with the psychological disturbance typically found in adolescents and adults abused as children.

There are unique features to each case which have affected how the victims perceived the experiences at the time, and how they subsequently dealt with the impact of the trauma in their lives.

All of the women report an intense anger toward the educational authorities who failed to respond to them at the time of their abuse. Their belief that the system not only failed to protect them, but also was complicit in covering up DeLuca's crimes, thus exposing other children to a sexual predator, continues to weigh heavily on their minds. One woman sadly reflected during her interview, "I told and I told. My parents told and told. Nothing happened." Another woman articulated her frustration, "Teachers saw and did nothing. They could have stopped it."

i) Child Sexual Abuse Experience

There were, as we have seen, common elements in the incidents of abuse. Most of the individual complainants (and I include those whose complaints did not result in convictions) were between the ages of approximately 12 and 14 years when they were the victims of a sexual predator in their daily school situation. They are now between the ages of 26 and 39. The abuse ranged from fondling to intercourse, often involving a high degree of coercion and sexually aggressive behaviour, and included sexually harassing remarks. There was a sadistic element to the abuse in the sense that the victims were made to feel shamed and humiliated. Many of them speak of the deep sense of intimidation they felt at DeLuca's explosive and threatening behaviour. One woman, as a result of her experience with DeLuca, continues to experience "anxiety to feeling confined or constricted". She avoids confrontation and fears anger in others.

Added to the feelings of isolation and victimization the girls suffered was the aftermath of their disclosures. Understandably, their trust and confidence in authority figures was badly shaken by their experience. Many are still in a state of disbelief that such an individual could have been protected for so long by educators who, they are convinced, were aware of his abusive behaviour and took no action to stop it.

The girls were not supported or provided with any sense of safety and security in response to their disclosures. Many of them were punished for telling and were made to feel that they were to blame for making false accusations against a teacher. Some say they were accused of slander and, at least in one case, the family says that they were warned that the school would sue them if they attempted to take the matter further.

One victim indicates that her experience has prompted her to keep her own children out of the Separate School system. By doing this, she has experienced further suffering. She now feels guilty in having deprived her children of a Catholic education because of her abuse.

Another victim shared her recollection of the aftermath of her disclosure to her principal. She recalls that no action was taken, DeLuca continued to be her teacher, and that he "taunted and embarrassed her in class." She also has chosen to enroll her children in the public school system. This woman continues to mistrust authority figures, and finds herself highly concerned about the safety of children.

In another case, a young victim, who was described by her mother as having been a "compliant, quiet child - acquiescent to authority", was ordered by her principal not to tell anyone about the abuse. She did as she was told and, as a result, her mother did not learn of the abuse until the 1994 police investigation.

Another mother similarly recalls her daughter telling her, following her disclosure of DeLuca's abusive behaviour to her principal, that DeLuca "sneered and laughed at her, and harassed her". This victim often skipped school to avoid DeLuca.

Clearly, such responses by persons in positions of trust serve to compound the trauma of sexual abuse and destroy children's trust in the idea of a benevolent and protective authority. Many of these women continue to distrust persons in authority, others have taken such action as they can to protect their children, a few have become advocates for the implementation of change.

In considering the long-term consequence of sexual abuse for these women, it appears that whatever pre-existing individual or family problems

they may have had were worsened by the sexual misconduct to which they were subjected. Where a victim was already vulnerable to emotional problems by reason of her own family dynamics, the abusive experience has created significantly more severe problems and more serious long-term consequences. It is well recognized that many children look to teachers to compensate for emotional deficits in their home life, a factor which can put them at risk for sexually predatory teachers, as was the case with some victims here.

Many of the women report being significantly affected by their involvement for over four years in legal proceedings and by the ongoing media coverage. Their participation in investigative interviews, individual assessment interviews and court testimony brought back active memories of the abuse and triggered a host of feelings, including outrage, powerlessness, depression, anxiety, and sadness in having to undergo this process. One of the victims experienced anxiety, insomnia and nightmares during this time period which required medical attention. Her problems, she says, resulted from flashbacks of being abused by DeLuca, and had a significant negative impact on her sexual relationship with her husband.

"We never should have had to go through
this if someone had done something to stop
him at the time we first told."

Unrelenting feelings of anger and rage are not unusual. Some of these women have experienced profound unhappiness in many aspects of their lives and have engaged in therapy to help deal with feelings of violation, stigmatization and self-blame. Some are concerned that people in the community can identify them as victims of DeLuca and feel shamed because of this. A mother who was interviewed commented that "it is difficult for the victims when a perpetrator returns to a small community." She worries about her daughter's reaction should she see DeLuca on the street or in a store.

ii) Interpersonal Functioning

Interpersonal relationships have been affected to varying degrees in the lives of these women. Although many are married with children, some have difficulties with sexual intimacy and trust in relationships. One woman reported that, despite being involved in a loving, caring relationship with her

husband, she has great difficulty in responding to him sexually and that this is causing her great distress. Another woman cannot tolerate being touched or kissed in a particular way by her husband. Her reaction, following treatment for trauma, is documented in an assessment report where she revealed "now that the connection has been made between DeLuca's fondling and kissing and my husband's advances, I feared visions of DeLuca and not my husband or the same awful feeling of DeLuca's hands and lips anywhere near me." One victim reports that she has completely lost the capacity for pleasure in her life, and feels emotionally absent from her spouse and children. She continues to be socially withdrawn.

iii) Child-Parent Relationships

In the majority of cases, the women have a realistic view of their children's needs and are supportive of their children's activities in school and extracurricular activities. However, almost all of them voice a concern for the protection and well-being of their children and are extra-vigilant about the possibility of sexual predators being amongst adults who deal with children.

Varying degrees of overprotectiveness are shown by these women, from clear hypervigilance, on the one hand, to mild ruminations, on the other. Almost all are anxious about their children's development and safety. In some cases this has led to anxiety about their own parenting abilities and the worry that they are not handling their responsibilities as well as they might be handled.

For many of these mothers, their trust and confidence in authority figures remains low, but a more positive adjustment is shown by some who participate in parent-teacher associations where steps are taken to ensure the proper implementation of prevention protocols for their children's safety.

iv) Summary

The trauma suffered by these women as children has cast a shadow over their lives, causing varying degrees of disruption and emotional distress, which continues to the present time. DeLuca's sexual abuse and sexual harassment, together with the humiliation and shame attendant on his behaviour, were hard enough to endure without the added insult of being

disbelieved and disregarded by teachers, principals and School Board officials.

How the education system so effectively "covered up" for DeLuca remains a source of mystery and anger for them. The lack of documentation by those who received reports of abuse; the refusal to believe or pursue their complaints; the protection afforded to DeLuca from higher levels in the education system; the lack of response by the education system to parental complaints; the punishing of children for disclosing the truth; and the continuation of sexual abuse of children for over 20 years combined to create a terrible sense of injustice for these women. For many of them, the bigger crime was the failure by the education system to protect children and to accept responsibility for what had happened until compelled to do so.

In the interviews conducted by this review with certain of the victims, we focused on future issues, such as recommendations they wished had been in place at the time of their victimization, rather than repeating questions that had been asked of them many times throughout the court proceedings. It appears from these interviews that the impact of the abuse has made many of them overly protective of their own children and unsure of the ability of the school to protect them. Some are positive about the changes the School Board has implemented with respect to sex education programs. However, questions continue to be raised about the ability of schools to follow the correct protocol in reporting sexual abuse should it occur. Their experience of child sexual abuse and harassment at the hands of a teacher, as well as their view of the complicity of the education system in protecting the perpetrator, has created a great mistrust in education authorities and has placed an unnecessary burden of concern on these women in their role as parents.

However, these women have a clear sense of how schools could change to prevent future tragedies. Amongst the recommendations suggested by them were the following: mandatory sexual abuse prevention programs to be implemented in all schools beginning in the kindergarten classes; professional, trained facilitators to deliver prevention and sex education programs in the schools (teachers are not trained and may be uncomfortable in doing this type of work); public health nurses to have regular office hours at the schools; co-ordination of services between education, health and social services; where possible, provide a second teacher (female) to attend during a child's disclosure; provide support for a child during and following a

disclosure; parents should be immediately informed regarding a physical or sexual abuse report or occurrence; a province wide protocol for teachers regarding the reporting of abuse; consistent implementation of reporting policies; teachers should be accountable and responsible - there should be professional ramifications and penalties for those teachers who are aware of an abuse situation and do not report it; there should be improved record keeping regarding teachers' misconduct, which should travel with them to a new employer; and there should be stiffer penalties imposed on teachers who abuse children in the system.

I. Some Conclusions Respecting the School Board

Every case of child sexual abuse brings awareness of the vulnerabilities of children and the capacity for someone to prey on those vulnerabilities. The DeLuca case is an egregious example of the harm that can result and the damage that can be caused when school children are sexually abused by a teacher in whose care they are entrusted, and underscores the need for protocols, practices and procedures designed to identify and prevent such abuse.

The terms of my mandate do not permit me to make disputed findings of fact relating to civil or criminal liability. However, on a realistic appraisal of the undisputed evidence, and without having to resolve any issues of credibility which may remain, the School Board failed its students by allowing DeLuca's abuse to continue for over 20 years. Indeed, in its letter of apology to his victims of August 1998, and its public apology of November, 1998, both of which are reproduced earlier in this Report, the School Board acknowledges that senior officials and employees of the Board had failed to take timely and effective action to prevent the harm that DeLuca visited upon students during his career at the School Board, and failed to adequately respond to students' cries for help. The Board also recognizes the trauma and humiliation that the victims had endured and the consequent "devastation of their lives". In sum, the School Board admits that it had failed to properly discharge its responsibility for the safety of its students.

In outlining the facts relating to the individual complainants, I commented on various aspects of the conduct of officials and employees of the School Board, and of DeLuca himself, throughout the DeLuca affair. In light of those comments, I think it necessary at this point only to make brief

reference to some conclusions that can be drawn about the School Board which may be helpful in understanding what went wrong, and in setting the stage for recommendations intended to reduce the likelihood of cases like this happening in the future.

The response of the School Board and its employees to complaints or disclosures of sexual abuse and harassment was completely inadequate and, indeed, harmful. It served to re-victimize students who had already suffered abuse by DeLuca, likely inhibited other students from complaining about DeLuca and, most tragically, allowed DeLuca to continue to harm more students. It involved, at times, stereotypical notions of what could be expected from a truthful victim, a minimizing of the seriousness of DeLuca's misconduct, a lack of objectivity and a self-serving approach to the complaints, a failure to properly document and investigate the complaints, and an absence of appropriate policies, practices and guidelines to identify suspected abuse and prevent its continuation. The School Board's failure may be more particularly summarized under the following headings:

i) Failure to Provide or Check References

During his 24 year career with the School Board, DeLuca taught at five schools. For the most part, when he was transferred to a new school, no inquiries were made of his former school in order to obtain any background on him, even when the new principal admittedly heard about problems DeLuca had had at his former school.

When inquiries were made, School Board members and, in particular, DeLuca's former principals, failed to provide details of complaints that had been received regarding DeLuca's inappropriate behaviour towards female students. One principal cited regulation 18(1) of the *Teaching Professions Act* as the reason for his failure to provide details of any of the allegations that he had received about DeLuca. He referred DeLuca's new principal to the School Board to avoid the obligation he believed he had under regulation 18(1) to inform DeLuca within three days of any adverse report he might make about him.

Had proper reference checks been conducted when DeLuca was transferred between schools, his abusive behaviour may have been prevented years earlier.

ii) Failure to Maintain Records

The School Board and its principals failed to maintain adequate records of complaints against DeLuca. Despite numerous allegations of abuse or improper conduct by DeLuca, most complaints were not documented, and the few records that referred to allegations of abuse were not placed in DeLuca's personnel file. The report of the 1985 investigation was not placed in DeLuca's personnel file and no copy was found in the School Board's file during the police investigation in 1994. When DeLuca was transferred to St. Mary's College in 1988, where he remained until his arrest in 1994, after 18 years as a teacher with the School Board and after having been the subject of many complaints by female students and their parents, the only documentation that accompanied him was his teaching certification. This absence of adequate documentation in DeLuca's file left each school unaware of previous complaints against DeLuca so that when DeLuca transferred to a new school, the school administration lacked the proper context within which to evaluate complaints it received about DeLuca.

When the School Board did document complaints regarding DeLuca, the documentation was inadequate and tended to describe the allegations in innocuous terms so that the nature of the allegations would not have been apparent to anyone who reviewed DeLuca's file. After the School Board had received several complaints about DeLuca making inappropriate advances towards female students, DeLuca was sent a letter which referred only in vague terms to "accusations made by some students relating acts of discretion (sic)". Another letter, sent by a teacher after she allegedly received complaints that DeLuca was assaulting students, made no reference to any complaints, and suggested that DeLuca may have "innocently" become involved in "difficult situations". The report following the 1985 investigation stated that DeLuca "used poor judgment in dealing with some situations which occurred during physical education lessons".

iii) Reaction to Disclosure

The School Board repeatedly failed to appropriately receive and act upon complaints regarding DeLuca disclosed by students, and failed to lend any support to students who disclosed allegations of abuse. The School Board's attitude created a climate which inhibited, rather than fostered,

disclosure. According to the victims, the School Board responded to complaints made by students in one or more of the following ways:

(a) Denial of Complaints

The School Board most often denied the legitimacy of allegations against DeLuca. Such complaints were typically dismissed as fabrication or rumor. Some students were directly accused of lying. Others were prevented from even voicing their complaints about DeLuca by warnings that they had better be "absolutely certain" that their complaints were legitimate, which suggested that the School Board's assumption was that their complaints were unfounded and would not be believed. One student's complaint that DeLuca had touched her breast in the main hall was rejected because it seemed implausible.

(b) Minimization of Complaints Received

The School Board minimized the complaints it received from students. Allegations were reportedly dismissed as "puppy love" or as just infatuation with a handsome teacher. Parents recall that their attempts to address concerns about DeLuca were resisted, and the School Board's reaction was to diminish the seriousness of their complaints and dismiss the parents as being over-protective. One student describes feeling "minimized and questioning whether her interpretations of DeLuca's actions were founded or even reasonable" after she was warned to be certain that her allegations were legitimate before being allowed to voice her complaints.

(c) Blaming the Victims

Often the victim was blamed for DeLuca's behaviour. One victim recalls being told that DeLuca had done nothing wrong. Several were told that they would be to blame if DeLuca lost his job, and that their allegations could ruin his career. Some girls were forced to leave the school after they complained that DeLuca had made advances towards them.

(d) Failure to Investigate

The School Board did not properly investigate allegations from students, nor did it report the allegations to the appropriate authorities. This

is particularly apparent in cases where the School Board had previously received complaints about DeLuca. Full investigations into the allegations suggesting that DeLuca was exhibiting inappropriate behaviour towards female students should have been conducted. The Board's failure to investigate the circumstances surrounding a note received by a principal indicating that DeLuca intended to have sexual intercourse with a student was inexcusable, as was its failure to pursue complaints of parents to the effect that DeLuca "stood too close to the girls while he marked their books", a student's disclosure that he had touched her in the supply room, and other direct allegations of his sexual misconduct against female students.

(e) Threats and Intimidation

Often students who complained were called into the principal's office and made to confront DeLuca with their allegations. This served to intimidate the students and encourage recantation. In addition, several parents allege that members of the School Board and/or DeLuca, in the presence of members of the School Board, warned them against pursuing their complaints, threatened that they could face a lawsuit for slander, and that they would lose any action they might bring since they did not have the financial resources available to the School Board or to DeLuca through his union. Further, students were allegedly threatened with expulsion from the school system, with criminal charges for spreading rumors about DeLuca, and with civil lawsuits against their families. One student alleges that she was warned by a uniformed police officer, in the presence of the principal, against spreading rumors regarding DeLuca. If accurate, these additional allegations constitute a further inappropriate response to students' complaints.

(f) Ill-motivated or Colourable Conduct

The preceding paragraphs have articulated the inadequacies in the School Board's reaction to the complaints regarding DeLuca. These inadequacies may have represented some misguided notion by some officials of their powers and responsibilities. On the other hand, another inference is available on the evidence. A number of Board officials or employees may have been disinterested in exposing DeLuca's suspected abuse. It might be inferred that this is the real reason why complaints were dismissed or minimized; alleged abuse and harassment were characterized as misunderstandings or personality

conflicts; and why inaction was rationalized on the basis of insufficient evidence. These officials or employees may have suspected DeLuca's abuse and refrained from making further inquiries out of loyalty for a colleague or concern for the reputation of their school system. Or, their conduct may have been coloured by such considerations. What cannot be disputed is that the best interests of the complainants were not given paramount consideration. Indeed, little thought was given to the ongoing risk to other students in DeLuca's classes.



III

EXTENT AND NATURE OF TEACHER-STUDENT SEXUAL MISCONDUCT

Introduction

The thought that our children might not be safe from sexual aggression while in school, the thought that their teachers or other school employees might be the aggressors—these are possibilities that are really not very comfortable to think about. As few as fifteen years ago these were possibilities that were almost unthinkable; now they seem almost commonplace. I am not in any way suggesting that the reality of what children experience has somehow changed; it has just finally come out into the open.¹

Until the 1980s, child sexual abuse in Canada was a largely invisible social problem, perhaps well known to child protection workers and police, but not a topic of much public consideration. As later elaborated upon, statutory provisions then in existence perpetrated stereotypical notions about the presumed unreliability of child witnesses and sexual complainants which undermined the ability to prosecute appropriate cases.² Legal reforms made principally to the *Canada Evidence Act* and to the *Criminal Code* in 1988

¹ T. Ulrich, "Sexual misconduct in schools: the impact on education" in W.F. Foster, ed., *Education and Law: Education in the Era of Industrial Rights: Proceedings of the Conference of the Canadian Association for the Practical Study of Law in Education*, held in Halifax, April 1993 (Chauteaugay: Lisbro, 1993) 1 at 1.

² Canada, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youth* (Ottawa: Minister of Supply and Services Canada, 1984) ("the Badgley Report"); L. Biesenthal, *Child Sexual Abuse Prior to Bill C-15: A Synthesis Report* (Ottawa: Research Section, Department of Justice, 1991).

prompted a dramatic increase in the number of cases heard in Canadian courts.³ Indeed, the number of historical cases that have since come to light is a testament to both the reluctance of victims to come forward in past years and the more understanding reception they receive today when bringing complaints forward to authorities.

While we no doubt have a better understanding of child sexual abuse today than in the 1980s, it remains an uncomfortable topic of discussion for most people and public institutions. Schools are no exception. High-profile cases, such as the Mount Cashel case, have served to raise public awareness, as have a series of initiatives by the federal government such as the Badgley Commission⁴ and, more recently, the investigation of abuse at residential schools.⁵ While educators have sought to keep pace with initiatives such as zero-tolerance for peer-to-peer abuse and sexual harassment, the sexual abuse of students by educators has been a difficult issue to acknowledge.⁶

This chapter examines what is known from the research literature and the reported cases about educator sexual misconduct towards students, including the nature and extent of the misconduct, the characteristics of offenders and victims, student disclosure of offences, and the impact of teacher sexual misconduct on students. Certain myths or stereotypical assumptions which serve to hinder effective identification and prevention are also examined. These include the notion that truthful disclosures will be immediate, that only a pedophile would sexually abuse a child, and that

³ V. Schmolka, *Is Bill C-15 Working? An Overview of the Research on the Effects of the 1988 Child Sexual Abuse Amendments* (Ottawa: Department of Justice Canada, 1992).

⁴ *Badgley Report*, *supra*.

⁵ R. Browning & R. Morris, *Review of the Needs of Victims of Institutional Abuse* (Ottawa: Law Reform Commission of Canada, 1998). For another good review of the issue especially pertinent to the abuse of children by professionals, see British Columbia Ministry of Health, Child and Youth Mental Health Services, *Dimensions of Multiple Victim Child Sexual Abuse in British Columbia, 1985-1989 and Community/Mental Health Interventions* (Victoria: British Columbia Ministry of Health, July 1991).

⁶ S. McCrae Vander Voet & L. Palmer Nye, *Violence Free Schools: Developing and Implementing Sexual Assault Prevention Policy* (Toronto: Metropolitan Action Committee on Public Violence Against Women and Children, 1994).

outwardly minor offences cannot leave emotional consequences that extend into adulthood.

A. Prevalence of Teacher-Student Sexual Misconduct

It would clearly be useful to know, for example, how many teachers are accused of sexually abusing students in a given jurisdiction in a given year, how many accused teachers are actually charged under the Criminal Code of Canada and how many are convicted....one might have thought the answers to such questions would be fairly easy to discover. Surprisingly, at least to me, answers to these basic questions are not readily available...to further complicate matters, those who do have data are reluctant to share them.⁷

The extent of teacher-student sexual misconduct in this province, at this point in time, is not known. Little research on the subject is available, in part because of the problems faced by researchers. Studying covert behaviour is never easy because most cases are never discovered by authorities. Attempts to study those cases that are discovered can be met with suspicion by educators who believe that such cases are extremely rare and who fear that their profession will be unfairly denigrated by the unacceptable actions of a few. While the term "conspiracy of silence"⁸, suggested by some, may be too strong, Robert Shoop, a professor at Kansas State University and a recognized authority in sexual harassment prevention, rejects the notion that teacher sexual abuse is extremely rare.⁹ He characterizes this belief as reflecting a "state of denial" on the part of educators motivated by misguided loyalties and a sense of incredulity that a teacher could harm a child, let alone a student in his or her care.

⁷ R. Dolmage, "Accusations of teacher sexual abuse of students in Ontario schools: some preliminary findings" (1995) MXLI:2 *Alberta Journal of Educational Research* 137 at 128.

⁸ P.L. Winks, "Legal implications of sexual contact between teacher and student" (1982) 11:4 *Journal of Law and Education* 437.

⁹ R.J. Shoop, "See no evil: sexual abuse of children by teachers" (1999) 6:7 *The High School Magazine*.

Teachers who sexually abuse students, not surprisingly, do not generally come forward to identify themselves or to seek assistance with their behavioural problems. More often than not they take measures to ensure that their victims remain silent or are not believed should they tell. For reasons discussed later in this chapter, many victims in fact do not report the improper conduct. Moreover, some reported incidents are handled informally at the school level and never disclosed to the school boards, child welfare officials or the police.¹⁰ Even if an authorized agency becomes aware of an incident, there is no centralized record keeping system from which researchers can obtain the information.

In addition, even when complaints of abuse are disclosed, it may not be possible to substantiate the complaints. The accused abuser is often a popular and well-respected teacher whose word will be accepted ahead of that of a student. This is indeed likely since abusers regularly target children who, for one reason or another, do not make credible complainants. School authorities and the accused teacher's colleagues tend to believe that were the teacher an abuser, they themselves would have been able to spot the improper conduct. Furthermore, such complaints are made in the context of an entrenched belief that most allegations against teachers are misinterpretations of innocent behaviour or are maliciously advanced by vengeful students.

These factors militate in favour of denying the validity of complaints and operate to limit the ability to determine the true extent of educator sexual misconduct. In consequence, it can safely be assumed that many, probably most, incidents of sexual misconduct go undisclosed or unreported.

i) Public Domain Cases

Researchers who seek empirical data on this topic have largely been limited to reviewing cases that come into the public domain. The "iceberg" metaphor is often applied when public domain cases are studied because focus

¹⁰ *Ibid.*, at 130. See also the discussion in Chapter VI of the surveys of children's aid societies; and R. Tripp, "Unions defend teachers, 'No matter what'" *Kingston Whig-Standard*, (September 15, 1997). In September 1997, the *Kingston Whig-Standard* published a series report on the issue of sexual misconduct in the Ontario school system: R. Tripp, "Trust Betrayed" *Kingston Whig-Standard* (September 13-17, 1997). The series provided a broad review of cases in Ontario and an insightful analysis of the issue.

on the visible cases should not obscure the fact that they represent only the "tip" of the total number of cases. Public domain cases primarily include those reported in the news media, in disciplinary and labour arbitration decisions, and in criminal law reports.

A review of the cases revealed by these sources makes it clear beyond question that DeLuca is not an isolated case and the misconduct in which he engaged cannot be considered uncommon.

Between 1989 and 1996, over 100 cases of sexual misconduct by teachers involving students were dealt with by the Ontario Teachers' Federation ("OTF"). Since assuming jurisdiction over teacher discipline from the OTF in 1997, the Ontario College of Teachers has dealt with about 20 such cases.¹¹ In the context of grievance proceedings, labour arbitration boards have dealt with numerous cases of sexual misconduct by teachers and other school board employees.¹²

In addition, there have been approximately 100 reported cases in Canada since 1986 of criminal proceedings against teachers, principals,

¹¹ Only about 18 of the OTF and College of Teachers cases are included in the reported criminal cases referred to below.

¹² See, for example, the following cases regarding teachers: *Re Brant County Board of Education and OSSTF*, *Brant District Five* (January 6, 1997) (Devlin)[unreported]; *Re Ottawa Board of Education and OSSTF* (March 22, 1995)(Kaplan)[unreported]; *Re Ontario Public School Teacher's Federation and Northumberland-Clarington Board of Education* (October 20, 1994)(Mitchnick)[unreported]; *Re Ontario Public School Teachers Federation and Perth County Board of Education* (April 19, 1995)(McKechnie)[unreported]; *Re York Region Board of Education and OSSTF* (February 18, 1999) (Shime)[unreported]; *Re Simcoe County Board of Education and OSSTF*, *District 27* (June 24, 1996) (Kaplan)[unreported]; *Re Ontario Public Service Teachers' Federation and Perth County Board of Education* (April 22, 1998) (Hunter)[unreported].

For cases involving custodians, see, for example, *Re York (City) Board of Education and C.U.P.E*, *Loc. 994* (1993), 37 L.A.C. (4th) 257 (Burkett); *Re Metropolitan Separate School Board and C.U.P.E.*, *LOC. 1280* (1992), 27 L.A.C. (4th) 154 (Brandt); *Re Ottawa Board of Education and Ottawa Board of Education Employee's Union* (1989), 5 L.A.C. (4th) 171 (Bendel); *Re Dartmouth School Board and Nova Scotia Union of Public Employees, Unit No. 2*, (1983), 12 L.A.C. (3d) 425 (Flemming).

volunteers and other school employees.¹³ A high percentage of criminal cases, however, are not reported, in large measure either because they involve guilty pleas or trials that raise no issue of general interest.¹⁴ Indeed, the DeLuca case itself is not to be found in any law report.

The news media provides accounts of cases that often do not appear in print anywhere else. A search of this source of information reveals a substantial number of cases of teachers charged with or convicted of sexual abuse of students. Indeed, it is pertinent to note that since this review began, reports have appeared with alarming frequency in our daily newspapers of criminal and disciplinary cases against teachers for sexual offences against students. By way of example:

- In June, 1999, a Chatham teacher, charged with indecent assault, sexual exploitation and possession of child pornography, was committed to stand trial.¹⁵ He later pleaded guilty to one count of making child pornography and, as part of a negotiated plea, agreed to resign from his teaching job and surrender his teacher's certificate.¹⁶

¹³ Reported cases of sexual misconduct perpetrated by school principals include, for example, *R. v. Kennedy*, [1993] O.J. No. 1434 (Gen.Div.)(QL); *R. v. Pilgrim* (1981), 64 C.C.C. (2d) 523 (Nfld. C.A.); *R. v. Quigley* (1987), 66 Nfld & P.E.I.R. 24 (Nfld. S.C.); *R. v. Profit* (1993), 85 C.C.C. (3d) 232 (S.C.C.). Reported cases against school bus drivers include, for example, *R. v. Geddes* [1999] O.J. No. 4419 (Ont. Ct.)(QL). For an account of a school volunteer convicted of sexual offences, see J. Sims, "Master of Deception" *London Free Press* (April 18, 1998).

¹⁴ N. Trocmé & K. Schumaker, "Reported child sexual abuse in Canadian schools and recreational facilities: implications for developing effective prevention strategies" (1999) 21:8 *Children and Youth Services Review* 621.

¹⁵ "Hearing held in sex case" *London Free Press* (June 22, 1999).

¹⁶ "Ex-teacher jailed over child porn" *London Free Press* (July 3, 1999).

- An elementary teacher in London was sentenced in July, 1999, to a three-month prison term after pleading guilty to indecently assaulting two boys.¹⁷
- In August, 1999, a Quebec soccer coach and primary-school teacher was sentenced to six years in prison for having sexually abused eight children during the 1970s.¹⁸
- In September, 1999, a science teacher at a Toronto high school was found guilty of french-kissing two of his students.¹⁹
- Three new complainants were reported in September 1999 to have come forward with sexual abuse allegations against a teacher in the Toronto school system who was convicted in June 1999 of 11 sex-related offences against six boys who were his students between 1962 and 1980.²⁰
- In October 1999, a Kitchener high school teacher pleaded guilty to fondling a 15-year old male student.²¹
- A popular Kingston high school teacher was tried and convicted in November, 1999 of three sex offences against former students.²²

¹⁷ B.Price and J.Bell, "Teacher jailed for indecent assaults: two London youths assaulted at elementary teacher's northern Ontario cottage" *London Free Press* (July 15, 1999).

¹⁸ M.King, "Sexual predator jailed: former teacher and soccer coach gets 6 years for abusing children" *Montreal Gazette* (August 26, 1999).

¹⁹ "Teacher guilty of kissing teen girls" *Toronto Sun* (September 28, 1999).

²⁰ J.Gadd, "Pedophile faces accusations from three new complainants" *Globe and Mail* (September 8, 1999).

²¹ "Teacher fired for fondling" *Toronto Star* (October 21, 1999).

²² "Teacher guilty on 3 sex counts" *Ottawa Sun* (November 13, 1999).

- In November 1999, a retired principal and 30-year veteran educator, was charged with sexual assault and sexual exploitation of a former male student who was 14 to 15 years old at the time.²³
- In December 1999, a Toronto high school math teacher was charged with sexual assault and sexual exploitation over alleged incidents involving ten students.²⁴
- In December 1999, a retired Toronto teacher was sentenced to five years imprisonment after being found guilty of 27 sexual offences against 14 of his students over a 15-year period. All of the student - victims were between nine and 14 years old at the time of the offences.²⁵
- In January 2000, a Kitchener teacher was in court on charges of sexual exploitation for allegedly asking a 17-year-old student to perform oral sex on him.²⁶
- In February 2000, a Niagara Falls teacher was charged with having sexually abused a male student some years ago in his Grade seven classroom.²⁷
- In February 2000, the Divisional Court upheld a decision of the Ontario College of Teachers suspending a Simcoe

²³ "Retired principal charged with sex assault on ex-student" *Globe and Mail* (November 30, 1999).

²⁴ "Teacher charged with sexual assault" *Globe and Mail* (December 2, 1999).

²⁵ D. Vincent, "Suit to aid victims, court told: sex-assault case complainant sues alleged perpetrator" *Toronto Star* (December 7, 1999); T. Huffman, "Ex-Teacher jailed for attacking pupils" *Toronto Star* (December 21, 1999).

²⁶ "Teacher admits discussing his sex life with students" *Toronto Star* (January 11, 2000).

²⁷ "Niagara Falls: teacher faces sex charges for incidents in 1970s" *The Standard (St. Catharines - Niagara)* (February 17, 2000).

County female teacher's certificate for engaging in an inappropriate relationship with a grade seven student. The teacher had exchanged letters, cards and e-mail messages containing sexual innuendo, endearments and personal comments, as well as gifts, such as jewellery and chocolates with the student.²⁸

ii) Self-report Studies

Information on the prevalence, if not incidence, of teacher sexual misconduct may come from studies that ask students or former students about their experiences.²⁹ This technique is similar to victimization surveys that measure the dark figure of crime — the difference between the number of offences that occurred and the number of offences about which the police are made aware.³⁰ For example, the National Crime Victimization Survey in the United States determined that only 30 percent of sexual assaults against juveniles (ages 12 to 17) that were known by their families were reported to or discovered by authorities.³¹

The self-report research presently available was all conducted in the United States, where the problem of teacher-student sexual misconduct has gained prominence and is being subject to increased scrutiny. The following

²⁸ R. Granatstein, "Teacher's pet: Boy, 13" *Toronto Sun* (February 18, 2000); R. Granatstein, "Sex-letter teacher gets legal lesson" *Toronto Sun* (February 22, 2000); N. Keung, "Teacher still banned for wooing boy, 13" *Toronto Star* (February 22, 2000); J. Gladd, "Teacher's suspension to stand, panel rules" *Globe and Mail* (February 22, 2000).

²⁹ Incidence rates tell us how many new cases are officially reported each year in a given population. Prevalence estimates indicate the number of people in the population who have experienced sexual abuse while under the age of 18.

³⁰ It is conservatively estimated that more than half of all crimes are not reported to the police. For sexual offences, the proportion of cases that remain undiscovered may well be 90 percent: A. Hatch Cunningham and C.T. Griffiths, *Canadian Criminal Justice: A Primer* (Toronto: Harcourt Brace, 1997).

³¹ D. Finkelhor & R. Ormrod, *Reporting Crimes Against Juveniles: OJJDP Juvenile Justice Bulletin* (Washington DC: Office of Juvenile Justice and Delinquency Prevention, 1999).

studies surveying students about teacher abuse³² are commonly cited by those seeking to understand how common the problem is:

- (1) The American Association of University Women (AAUW) surveyed more than 6,000 randomly selected students in grades eight through 11. Twenty-five percent of the girls and ten percent of boys said they had been harassed or abused by a school employee.³³
- (2) In a survey of 300 recent high school graduates in North Carolina, to which 148 responded, 90 incidents of sexual harassment, sexual touching or intercourse were reported. Nineteen girls (nine-and-a-half percent of the entire female sample or eighteen percent of the 105 respondents) and one boy said they had had intercourse with a high school teacher.³⁴
- (3) A sample of 4,340 adults from Idaho were asked about sexual misconduct they had experienced when in school, behaviours that ranged from obscene comments to sexual intercourse. One percent reported such behaviour in

³² United States, National Center for Education Statistics and Bureau of Justice Statistics, *Indicators of School Crime and Safety, 1998* (Washington DC: U.S. Department of Education and U.S. Department of Justice, 1998).

³³ *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*. (Washington DC: AAUW, 1993). Students were asked about the following behaviours: made sexual comments, jokes, gestures or looks; showed, gave or left you sexual pictures, photographs, messages or notes; wrote sexual graffiti about you on walls; spread sexual rumours about you; said you were gay or lesbian; spied on you as you dressed or showered; flashed or mooned you; touched, grabbed or pinched you in a sexual way; pulled at your clothing in a sexual way; intentionally brushed against you in a sexual way; pulled your clothing off or down; blocked your way or cornered you in a sexual way; forced you to kiss him or her; or forced you to do something sexual other than kissing.

³⁴ D.H. Wishnietsky, "Reported and unreported teacher-student sexual harassment" (1991) 84:3 *Journal of Educational Research* 164.

elementary school while the figure for secondary school was three percent.³⁵

These surveys are most accurate when using large samples of randomly selected respondents and assurances of anonymity, as with the AAUW survey. Charol Shakeshaft, a professor at Hofstra University and an authority on sexual abuse and harassment in schools, agreed with the findings of the AAUW survey and estimated that 15 percent of all students will be victims of sexual misconduct by a teacher before they graduate.³⁶ If these estimates are anywhere near correct, and assuming that the Canadian experience is similar, the problem is obviously more pervasive than most people imagine.

iii) Rates of Increase

Is educator sexual misconduct on the increase? This is a question that cannot be answered without a reliable source of information on the yearly incidence of such conduct. One is certainly given the impression of an increase by the frequency of media reports such as those cited above. As discussed later in this Report, our survey of school boards indicates that they are being called upon to respond to more cases than in the past. As another example, a survey conducted by the *Pittsburgh Post-Gazette* documents a 78 percent increase in the number of American teachers who had their licences revoked for sex-related offences between 1994 and 1998.³⁷ The apparent increase in such cases may be related to the growing understanding of early identification and the need for sensitive response to student disclosures.

iv) Summary

While we do not have precise statistics on the extent of teacher sexual misconduct, a review of the reported criminal cases, the disciplinary and labour arbitration board decisions and media accounts, makes it abundantly

³⁵ S.B. Bithel, *Educator Sexual Abuse: A Guide for Prevention in the Schools* (Boisie: Tudor House, 1991).

³⁶ C. Shakeshaft, *In Loco Parentis: Sexual Abuse in Schools* [in press].

³⁷ J.E. Zemel and S. Twedt, "Dirty secrets: why sexually abusive teachers aren't stopped" *Pittsburgh Post-Gazette* (October 31, 1999).

clear that a significant number of teachers have engaged in sexual misconduct of one form or another. Moreover, it can be concluded beyond question that many other incidents of teacher sexual misconduct have occurred.

I accept, as both teachers' unions and school boards have properly stressed, that the incidence of sexual misconduct is small relative to the large number of teachers and students in our school system. However, the incidence is certainly frequent enough and serious enough to deserve more attention than it presently receives. The harm caused by sexual misconduct can be devastating. If our schools are truly to be safe and nurturing places for children to learn and grow, the problem must be actively addressed, and every effort must be made to protect our students.

The vast majority of teachers are unquestionably highly dedicated and caring individuals who seek to ensure a safe learning environment for their students. However, like other professions, the teaching profession has its share of "bad apples". By their aberrant behaviour, they put children who are unable to protect themselves at serious risk of physical, mental and emotional damage. It is to the identification of such persons and the prevention of such harm that this Report is directed.

B. Characteristics of Teacher Sexual Misconduct

Often the teachers who sexually abuse their students are judged to be among the very best teachers in a district and are very popular with students and parents. In our study, the allegations of abuse were most likely to be made against staff members who worked with students in extracurricular activities or who had frequent one-on-one contact with students. For instance, a disproportionate number of accusations were made against coaches and drama, art, music, and gym teachers. Often the abusers had been awarded prizes for outstanding teaching by local and state organizations. Indeed, many of the abusers seemed to be teachers whom, before the allegations, parents hoped their children would get.³⁸

³⁸ C. Shakeshaft & A. Cohan, "Sexual abuse of students by school personnel" (March, 1995) *Phi Delta Kappan* 513 at 515-516.

i) Overview

The available research may shed little light on the frequency or rate of increase of educator sexual abuse but it does help us understand the characteristics of the phenomenon. In this regard, several American studies proved helpful, most notably a review of 225 New York cases dating from 1990 to 1994,³⁹ and an analysis conducted by *Education Week*⁴⁰ of 224 national cases from six months in 1998. While the studies investigate all school employees, most cases involve teachers. Like DeLuca, the abuser is often a popular teacher with a long service record. Other cases involve young teachers new to the profession. In the New York study, 38 percent of cases came from elementary schools, 20 percent from middle schools, 36 percent from high schools and the remaining six percent from other types of schools.

ii) Gender of Teacher and Student

Male Teacher - Female Student Cases

As with sexual offences in general,⁴¹ sexual misconduct by teachers is perpetrated overwhelmingly by males,⁴² overwhelmingly against females.⁴³ In

³⁹ *Ibid.* See also C. Shakeshaft "Responding to complaints of sexual abuse: new study examines how school districts are handling allegations" (1994) 51:9 *AASA School Administrator*.

⁴⁰ C. Hendrie, "Sex with students: when employees cross the line" *Education Week* (December 2, 1998). Seven of ten cases involved teachers with the remaining number involving principals, janitors, bus drivers and librarians.

⁴¹ Canadian Centre for Justice Statistics, "Sex offenders" (1999) 19:3 *Juristat: Canadian Centre for Justice Statistics*. In Canada, among incidents reported to the police, the majority of sex offence victims who are under 18 years of age are girls (82 percent in 1998).

⁴² Shakeshaft and Cohan found that 96 percent of their 225 cases involved males while 80 percent of the 224 educators in the *Education Week* survey were male. In an Ontario survey of teacher federation affiliates, only one of the 47 cases they identified involved a woman teacher: Dolmage, "Accusations of teacher sexual abuse in Ontario schools", *supra*.

⁴³ In the *Education Week* survey, two-thirds of the victims were female. In the Shakeshaft and Cohan study, 78 percent of the victims were female.

other words, the majority of sexual misconduct cases involve male teachers and female students, making this the most common type of educator sexual misconduct. About half of these cases occur in elementary settings and the other half in secondary schools. Because there is an equal ratio of male to female students in the school system, this means that girls and young women are at greater risk of being the victims of educator sexual misconduct. However, the prevalence of female victims may, to some degree, be attributable to a greater reluctance among male victims to disclose sexual abuse.⁴⁴ This phenomenon is discussed later in the chapter.

Male Same-Sex Cases

In the New York study, about 20 percent of the male abusers had targeted male students while five percent had abused both boys and girls. The male students abused by male educators were more likely to be younger and abused in an elementary school context, again a finding consistent with sexual offences in general, where male victims are younger on average than female victims.⁴⁵ Despite a concern of some that homosexual male teachers are at high risk of sexually abusing students,⁴⁶ all the men in this study described themselves as heterosexual.

Female Teacher - Male Student Cases

In the *Education Week* survey, 89 percent of the cases involving women abusers had male victims. Perhaps the most high profile U.S. case involving a female teacher occurred in Washington State where Mary Kay LeTourneau was convicted of child rape in 1997 for having a sexual relationship with a 13-year-old male student. The case has been the subject of intense media coverage. It has been suggested that this public discussion

⁴⁴ London Family Court Clinic, *Tipping the Balance to Tell the Secret: the Public Discovery of Child Abuse* (London Ont.: London Family Court Clinic, 1995).

⁴⁵ Canadian Centre for Criminal Justice Statistics, "Sex offenders", *supra*.

⁴⁶ P. Cameron, "Homosexual molestation of children: sexual interaction of teacher and pupil" (1985) 57:3(2) *Psychological Reports* 1227.

of this case has created a better understanding of the issues, and has helped more male victims to come forward.⁴⁷

In December 1999, a female teacher in British Columbia resigned during a police investigation into allegations that she had a sexual relationship with a 17-year-old male student at the high school where she taught.⁴⁸

In Ontario, there are several cases of alleged sexual misconduct by female teachers against male students presently before the College of Teachers. One case, to which reference has already been made, involves a 28-year-old teacher who exchanged letters, cards and e-mail messages with a 13-year-old male student, which were replete with sexual innuendo, endearments and personal comments. The teacher also exchanged gifts, such as jewellery and chocolates, with the student. The College found the teacher's conduct constituted a "serious boundary violation", and suspended her licence.

Female Same-Sex Cases

In the *Education Week* study, five of the 224 cases were same-sex female cases, suggesting that this is the smallest category of educator sexual misconduct. If reported criminal cases are any indication, most female same-sex cases involve young teachers and adolescent students. For example, in Saskatoon, a female teacher was sued by a former female student in 1999 after she was convicted of sexually assaulting the student over a three-year period beginning when the student was 13 years old.⁴⁹ A 24-year-old British Columbia teacher was convicted in 1992 of two counts of sexual exploitation for fondling and kissing two girls, ages 15 and 16, who were students at her school.⁵⁰ Another teacher was convicted in 1993 of gross indecency for

⁴⁷ C. Hendrie, "Abuse by women raises its own set of problems" *Education Week* (December 2, 1998).

⁴⁸ J. Steffenhagen, "Accused teacher resigns from job: the Sechelt woman has not been charged for alleged tryst with boy" *Vancouver Sun* (December 2, 1999).

⁴⁹ L. Perreault, "Former Debden teacher sued: sexual abuse victim also suing school division" *Daily Herald (Prince Albert)* (August 18, 1999).

⁵⁰ *R. v. Smart* (1992), 14 B.C.A.C. 73.

kissing and fondling the breasts and genitals of a 14- to 15-year old female student.⁵¹

An Ontario female teacher was recently acquitted of sexual offences against a female student. While the trial judge found that the teacher's relationship with her student was "suspicious", he was not satisfied beyond a reasonable doubt that the offences had been committed. The student has now filed a civil suit seeking damages against the teacher for sexual abuse, harassment and stalking. The student is also suing the school board, claiming that the school board failed to detect the teacher's misconduct, and failed to protect the student from the unwanted attention.⁵²

iii) Types of Sexual Offenders

While some sexual offenders fit the criteria for pedophiles, that is, individuals who are attracted to and target prepubescent children, sexual abusers are a mixed group who defy specific personality labels or psychiatric description. There is no single "molester profile" and the origins of sexually abusive behaviours vary.⁵³ If they share a common characteristic, it is their preference for sexual exploitation of children and adolescents who, due to their age and innocence, can neither consent to such activities nor easily disclose the abuse. Nevertheless, understanding the different types of abusers can be helpful when designing prevention and intervention strategies.

Pedophiles

Pedophiles often gravitate to occupations which afford them the opportunity to be in the company of children. The field of education is a "ready target" for pedophiles, and for that reason they may choose careers as

⁵¹ *R. v. Robertson*, [1993] B.C.J. No. 1257 (Prov. Ct.)(QL).

⁵² D.Murray, "Woman files lawsuit against ex-teacher" *London Free Press* (February 8, 2000).

⁵³ R.A. Prentky, R.A. Knight & A.F.S. Lee, *Child Sexual Molestation: Research Issues* (Washington D.C.: National Institute of Justice, 1997) at 2.

teachers.⁵⁴ Abusers falling into the pedophile category usually prefer to work in the elementary school system where they have both access to young children and the time and opportunity to identify the vulnerable ones from the student population as a whole. Their daily and prolonged contact with potential victims, combined with the authority they hold by virtue of their position, affords the opportunity for victim selection, victim grooming and, ultimately, sexual abuse. They often rationalize their sexual activity as educational or sexually pleasurable for the child.

Other Abusers

While the public worry about the spectre of pedophiles in the schools, and describe as a "pedophile" almost everyone convicted of having sex with a child, the fact is that pedophiles make up only a minority of child sexual abusers. A psychiatrist specializing in sex offenders describes the word "pedophile" as a "most misused word". "Very few people", she says, "qualify as a pedophile. But any time there is a child involved, people use it".⁵⁵ In most cases, teachers who engage in sexual misconduct with children and adolescents are not pedophiles. Their abusive behaviour is more likely attributable to other factors.

Some teacher sexual offenders have been described as "boundary violators" or "romantic/bad judgment abusers".⁵⁶ Teachers falling into this category are individuals with bad judgment, poor interpersonal boundaries, poor understanding of adolescent development and sexuality, or social or emotional immaturity.⁵⁷ In contrast to the pedophile category, "boundary violators" do not work in schools to find opportunities for sexual contact and more often work at the secondary school level. They may describe their sexual

⁵⁴ B.M. Sullivan and G. Williams, *An Enquiry into the Sexual Abuse of Children by School Board Employees in the Province of British Columbia* (Victoria: British Columbia, 1986) at 27.

⁵⁵ C. Hendrie, "Labels like 'Pedophile' don't explain the many faces of child sexual abuse" *Education Week* (December 2, 1998).

⁵⁶ Shakeshaft and Cohan, "Sexual abuse of students by school personnel", *supra*.

⁵⁷ E. Doctor, "Someone else's nightmare: sexual misconduct in schools" Paper presented at the annual conference of the Canadian Association for the Practical Study of Law in Education, Toronto, April 25-27, 1999.

relationship with a student as an “affair”, and often fail to see any problem with their behaviour as the student appears to consent.

One such teacher argued unsuccessfully before an arbitration board that he had not received sufficient training to know it was wrong to send sexually graphic letters to two female students and have a sexual encounter with one of them in his car.⁵⁸ A Kitchener teacher charged with sexual exploitation for allegedly asking a 17-year-old student to perform oral sex on him, admitted telling three female students about his personal life, about getting his high school sweetheart pregnant, about putting his baby up for adoption, and about his first marriage.⁵⁹ A North York teacher, who had taught for 25 years, was dismissed after it was disclosed that he sought to establish a personal relationship with a student by taking her out for lunch, asking personal intimate questions about her sexual behaviour, calling her at home, and giving her a letter in which he expressed his wish for a personal relationship with her after her graduation.⁶⁰

Other teacher sexual offenders may be described as “narcissistic” or “opportunistic” offenders. These may be morally and sexually indiscriminate individuals, motivated by power, control or sexual gratification to prey on the vulnerability of whatever age students happen to be most readily available and accessible to them. DeLuca, who targeted students in different grades, fits this description. When he was asked at his parole board hearing whether he had a preference for certain age groups and why he assaulted different age groups, he responded: “The availability. When I taught grade 5, I assaulted grade 5. When I taught grade 7, I assaulted grade 7. When I taught grade 13, I assaulted grade 13...I’m sure that I would not have assaulted those 16 or 17 year old girls in secondary school had I still been teaching elementary school, it would have been elementary victims. I chose them because I had power or was in that position because I was in that controlled environment, maybe that’s the best way of phrasing it”.

⁵⁸ *Re Windsor Roman Catholic Separate School Board and Ontario-English Catholic Teachers Association* (January 11, 1993) (Brandt)[unreported].

⁵⁹ “Teacher admits discussing his sex life with students” *Toronto Star* (January 11, 2000).

⁶⁰ *Re North York Board of Education and Ontario Secondary School Teachers’ Federation* (July 20, 1995) (Brent)[unreported].

Some offenders are described as "situational offenders". These individuals, it is said, turn to children for sex as a result of problems, such as, alcohol abuse, loneliness, depression or stress. Their behaviour, it is sometimes contended, is "situational" and "out of character", because their problems have rendered them "vulnerable" to the sexuality of children or adolescents. Of course, such explanations cannot excuse their abuse of children.

However, while sexual offenders are a mixed group and the origins of their abusive behaviour may vary, it should be borne in mind that, notwithstanding different motivations, the harm they do to children is the same.

Female Offenders

Female offenders are different in ways that have implications for prevention. The study of women who sexually abuse children is still in its infancy.⁶¹ Advances in the area are in part slowed by the small number of cases available for study.⁶² A commonly cited typology of female sex offenders has three categories. The first is women who were themselves molested as children and who usually target their own children. The second category includes women who are coerced into sexual acts by men. They exhibit a pattern of extreme dependency and nonassertive behaviour and their victims are both within and outside of their family system. The last category, in the case of teachers, is the so-called "teacher/lovers" who fall deeply in love with the victim.⁶³ This is the category into which most female abusers

⁶¹ F. Mathews "The adolescent sex offender field in Canada: old problems, current issues, and emerging controversies" (1996) 11:1 *Journal of Child & Youth Care* 55.

⁶² In a sample of 4,500 federal sex offenders, only 19 were women: F. Syed & S. Williams, *Case Studies of Female Sex Offenders in the Correctional Service of Canada*. (Ottawa: Correctional Service of Canada, 1996). In a New England sample of 600 child molesters, nine were women: E.L. Rowan, J.B. Rowan & P. Langelier, "Women who molest children" (1990) 18:1 *Bulletin of the American Academy of Psychiatry and the Law* 79.

⁶³ J.K. Matthews, R. Mathews & K. Speltz, "Female sexual offenders: a typology" In M.Q. Patton, ed., *Family Sexual Abuse: Frontline Research and Evaluation* (Newbury Park CA: Sage, 1991) 199. Note also that many researchers add a fourth category, that of "male accompanied." Female sex offenders more often commit their offences with male co-

probably fall.⁶⁴ The teacher/lovers initiate the sexual contact, believe the sexual behaviour is an expression of love, do not recognize the negative impact on the youth, and have difficulty seeing the "relationship" as wrong. The teacher/lover generally selects an adolescent male to whom she relates as a peer. Sometimes she may engage the victim by offering to "teach" him about sex.

iv) Characteristics of Offences

Sexual abuse by teachers, like sexual abuse generally, most often occurs clandestinely and in private. However, it is erroneous to assume that this is invariably so. It may take different forms and proceed in different manners. Sexual abuse of students can occur in the school, in classrooms, in hallways, in offices and other places where other people might well be around. Sometimes the abuse happens right in front of other students. Shakeshaft gives examples of such cases: assaults by a teacher who has taken a student into a storage room attached to the classroom while the rest of the class does seat work; teachers touching students while a movie is being shown; boys reporting that the teacher would call them up to his desk at the front of the room and, one at a time, while discussing homework, fondle each boy's penis. In the latter case, every child in the room knew what was happening and, while they talked about it among themselves, the abuse was not reported for many years.⁶⁵ These examples are not unlike what happened in the DeLuca case. He also, it will be recalled, often abused his victims in a classroom full of students or in a supply room which was open to others.

In cases of sexual harassment, the conduct may take various forms, including verbal remarks, gestures, looks or physical contact. A long-serving Windsor high school teacher was suspended for such behaviour. During his

accuseds: K.L.Kaufman, A.M. Wallace, C.F. Johnson & M.L. Reeder "Comparing female and male perpetrators' modus operandi: victims' reports of sexual abuse" (1995) 19:3 *Journal of Interpersonal Violence* 322. In the Correctional Service of Canada study cited above, 14 of the 19 women committed their offences with male co-accused. One was a "teacher/lover" convicted of abusing an adolescent boy.

⁶⁴ C. Hendrie, "Abuse by women", *supra*.

⁶⁵ Shakeshaft, *In Loco Parentis*, *supra*.

grade ten history class, the teacher took a female student's hand and announced, "oh, you with the hot hands and the tight jeans really turn me on. If you were twenty years older I'd take you back to my favourite pad and we'd have some fun." In the same class, after another female student had given a correct answer, he asked the class "how many want me to kiss this young girl on the cheek?" and, after receiving an enthusiastic response, gave the student a kiss on the cheek.⁶⁶ Another teacher sexually harassed students by using sexually explicit materials in class; condoning or participating in classroom discussions on oral sex, lesbians, and the cost of prostitutes, all topics which had no bearing or link to the class curriculum; choosing inappropriate subject matter for drama club exercises, such as asking a female student to act out a rape scene, with the teacher acting as the rapist; making sexist comments; and condoning sexist comments by male students that caused female students to feel embarrassed and uncomfortable.⁶⁷

In cases of sexual abuse, the offender, using his position of power and authority, may employ various methods to induce a child to be compliant and silent. Frequently, raw force is unnecessary. Often, there is an engagement phase,⁶⁸ during which the adult begins a period of grooming⁶⁹ to cultivate a special relationship with the child. Also part of the engagement phase may be the creation of opportunities to be alone with the child. In one-third of the cases examined by *Education Week*, the educator was involved in extracurricular activities such as coaching or music instruction. These activities provide opportunities for prolonged or unmonitored contact with

⁶⁶ *Re Windsor City Board of Education and Ontario Secondary School Teachers' Federation, District 1* (February 29, 1988)(Weatherill)[unreported].

⁶⁷ *North York Board of Education and Ontario Secondary School Teachers' Federation, supra*. In grieving his dismissal, the teacher argued that as no concerns about his conduct had been brought to his attention, he was under the impression that his actions were acceptable. The grievance was dismissed as was an application for judicial review: *Stanwick v. North York Board of Education*, (1997), 105 O.A.C. 137 (Div. Ct.).

⁶⁸ S. Sgroi, *Handbook of Clinical Intervention in Child Abuse* (Lexington, MA: Lexington Books, 1982). Sgroi identified a predictable pattern of dynamics to the sexual encounters which she categorized into five phases, the engagement phase, sexual interaction phase, secrecy phase, disclosure phase and the suppression phase.

⁶⁹ Singer M.I., Hussey, D.L., Strong, K.J., "Grooming the victim: an analysis of a perpetrator's seduction letter" (1992) 16 *Child Abuse & Neglect* 877 at 884.

students in settings such as locker rooms, rehearsal rooms and road trips. They also constitute valued activities which students enjoy and which parents see as advantageous to their children. At the trial of a convicted pedophile who taught in at least seven Toronto schools over 30 years, victims testified that the teacher befriended them and their parents through a science club and other after-school programs.⁷⁰

Grooming behaviours include efforts to form a special relationship, such as providing treats, kind words, favours and attention; non-sexual touching to gauge the child's reaction; and, perhaps, sexual comments and use of pornography. The intention of grooming is to test the secrecy waters so as to determine who among the chosen targets will be least likely to tell; to desensitize the child through progressively more sexualized behaviours; to forge a valued relationship that the child will not wish to risk losing through disclosure; and to learn information with which to discredit the child should he or she tell. When children disclose in the grooming stage, the complaint is typically dismissed because the sexual intent behind the alleged behaviour is not apparent to the untrained observer and the conduct is seen as equivocal or innocent. It is after the engagement phase that the behaviour becomes progressively more intrusive. It may include kissing, touching over the clothing, touching genitals under the clothing, and intercourse.

There is not an engagement phase in every case. Sexual abuse may not be preceded with any grooming, or even warning. While DeLuca pursued his relationship with some victims through enticements, and, in a few cases, through the illusion of a "love affair," he assaulted others abruptly. In another case, a teacher approached a grade seven student in a locked classroom, chased her around the room, wrestled her to the floor and, holding her hands, straddled her and touched her breasts.⁷¹

⁷⁰ "Pedophile faces accusations from three new complainants" *Globe and Mail* (September 3, 1999).

⁷¹ *R. v. Derouet* (1989), 73 Nfld. and P.E.I.R. 320 (Nfld. C.A.).

v) **Efforts to Secure the Student's Continued Compliance and Secrecy**

No matter what the sequence of events that prompted the abuse, there is a need on the part of the offender to ensure that the student will keep what happened secret. Secrecy permits the abuser to continue victimizing that youth or to move on to others without detection. The teacher-student relationship places the educator in a position of power and authority over the child, able to bestow benefits such as good grades and equally able to enforce penalties that include denial of privileges, detentions, poor grades and even failure of a class or school year. Even when this fact is not made manifest in explicit promises or threats, students will be well aware of how they can benefit by silence and suffer for telling. This may seem illogical to an adult mind, as we assume that telling will be followed by arrest of the abuser. But the most common reason that youths do not disclose is fear they will not be believed.⁷² When the teacher has a good reputation and impressive credentials, fear of disbelief will be particularly high.

At his parole board hearing in July 1997, DeLuca acknowledged that his reputation in the community and his relationship with victims' families allowed him to continue his abuse for so long. Prior to being arrested and convicted for sex-related charges involving female students, a former principal and vice-principal of several schools in London, Ontario was named 1996 educator of the year by the Ontario Association of Home and Schools.⁷³ When a well-respected 16-year veteran teacher in Smith Falls, Ontario, was arrested for sexually assaulting a 17-year-old male student, he was the artistic director of the community choir, active in theatrical productions, and had been publicly lauded for his involvement in a program to keep kids off drugs.⁷⁴

The DeLuca case demonstrates that there is good reason for students' fears that their allegations will not be believed. Overwhelmingly, the girls experienced a disastrous response when they told about DeLuca's behaviour. Many were disbelieved, some were told to leave school, and parents were

⁷² LFCC, *Tipping the Balance*, *supra*.

⁷³ D. Murray, "Ex-principal guilty of sex crimes" *London Free Press* (December 4, 1998).

⁷⁴ *R. v Jamieson*, [1992] O.J. No. 3026 (Prov. Div.)(QL).

allegedly threatened with lawsuits. In *R v. H. (R.)*,⁷⁵ a student who reported that a teacher had touched her on the breast, was not believed, and was given a three-day suspension for spreading false rumours. The teacher was later charged with sexually assaulting other victims, and convicted of five counts of assaults. In the same vein, a victim of a Toronto elementary school teacher testified how helpless she felt when, at age 12, she and her parents tried to warn school officials about him. They were not believed, and she was returned to the class.⁷⁶

An abuser may compromise a youth so that the youth is motivated to keep the secret because he or she fears the consequences of telling. For example, the abuser may encourage his or her victim to use illegal drugs (so the victim fears arrest), or convince the victim that he or she is equally responsible for the sexual offence and will go to jail as well. When the victim is male, an abuser can suggest that discovery of the abuse will be proof to the entire school that he is homosexual, as in the case of one elementary school teacher who eventually was convicted of indecently assaulting two young male students.⁷⁷

When an effort has been made by a teacher to cultivate a special relationship, the implicit or explicit threat of withdrawing from that relationship may be the most effective deterrent to disclosure. This is especially true if the relationship provides the student with items or activities to which he or she would not normally have access. It is for this reason that children from poor homes can be both more vulnerable to sexual abuse and less likely to tell. Simply giving money or presents, a tactic certainly not limited to sexual abuse within the school system, can also be effective. A Toronto elementary school teacher sometimes used threats and intimidation, and at other times enticed students he sexually assaulted with candies and money.⁷⁸

⁷⁵ [1991] O.J. No. 2496 (Gen. Div.)(QL).

⁷⁶ "Sex attacks scar former students" *Toronto Star* (December 16, 1999).

⁷⁷ *R. v. Stewart* (1988), 3 Y.R. 107 (Y.T.S.C.).

⁷⁸ "Sex attacks scar former students" *Toronto Star* (December 16, 1999).

Some offenders simply employ threats to carry out their abuse. When DeLuca did not get what he wanted, or a student did not co-operate, he reacted through "a threat of removal of something which I knew they wanted and by intimidating and humiliating them."⁷⁹ In *R v. Foster*,⁸⁰ a teacher was convicted of rape and sexual assault causing bodily harm as a result of his sexual contact with four female students between the ages of 13 and 14. The students' participation was occasioned mainly by threats and intimidation, including threatening a student that he would fail her if she disobeyed him.⁸¹ In *R v. Maczynski*,⁸² the accused, a former supervisor at an Indian Residential School, was convicted of numerous counts of indecent assault, buggery and gross indecency. He carried out his assaults of young male students with threats of punishment.

C. Disclosure by Victimized Students

Keep in mind that children, by law, must be in school. Children know that adults require them to be in school, and thus, they reach the quite reasonable conclusion that we endorse what is done to them in schools. We may even tell them, "You must do what your teacher tells you." School is, for most children, their first public, societal, official institution. School, for children, is all they know about the "real" world, the non-familial world.⁸³

Teachers clearly have the power to make a student's life pleasant or unpleasant. It is also true that children are taught from an early age to defer to a teacher's authority. Beyond these obvious factors, students abused by teachers probably delay disclosure for the same reasons as young people in other situations: embarrassment, guilt, and fear—fear of retaliation by the

⁷⁹ DeLuca's National Parole Board Hearing, July, 1997.

⁸⁰ (1995), 128 Sask.R. 292 (C.A.).

⁸¹ L. Coolican, "For 30 years he taught—and all the while he stalked" *National Post* (January 15, 2000).

⁸² (1997), 120 C.C.C. (3d) 221 (B.C.C.A.).

⁸³ Shakeshaft, *In Loco Parentis, supra*, at 67.

offender, fear that no one will believe them, fear of being blamed and fear of some sort of punishment.⁸⁴

In general, the factors inhibiting disclosure include the existence of a relationship involving trust and dependency, the child's desire to comply with the requests of an adult whom they trust and by whom they wish to be accepted, exhortations to keep the secret, the child's feelings of guilt and self-blame, implied or imagined negative consequences of telling, such as fear of disbelief, rejection, shame, stigmatization, isolation, punishment, and even losing the non-abusive aspects of the relationship which can include friendship, activities and a sense of belonging.⁸⁵ The genuine affection a child may have for the teacher, especially one who promotes the "special relationship" and who has spent a great deal of time in the grooming phase, should not be underestimated.

Research on male victimization indicates that boys are much less likely to disclose sexual abuse than girls.⁸⁶ Boys are taught not to appear helpless or weak. The stigma associated with male victimization tends to effectively silence these victims. The fear of being labelled a homosexual is commonly insurmountable and often prevents them from reporting sexual abuse by a man. Since they are socialized to seek sexual experiences with females, they may also be inhibited from reporting unwanted sexual experiences initiated by females.

It used to be assumed that any child who was sexually abused by a teacher would tell his or her parents about it immediately. A disclosure not made relatively contemporaneous with the abuse would be seen as suspect at best. Assumptions such as these about how a child "should" disclose are problematic and may frustrate appropriate investigation of sexual misconduct complaints. Studies of child disclosure have contributed greatly to our

⁸⁴ LFCC, *Tipping the Balance*, *supra*.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

understanding of disclosure. For example, it is estimated that only 30 percent of sexually abused children disclose their abuse during their childhoods.⁸⁷

In *R v. W. (R)*,⁸⁸ the Supreme Court of Canada recognized this reality. In that case, the Court restored convictions entered by the trial judge, holding that the Court of Appeal had erred in relying on "the stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discontinued doctrine of recent complaint," when "in fact, the literature suggests the converse may be true; victims of abuse often do not disclose it, and if they do, it may not be until a substantial length of time has passed."⁸⁹

When victims fail to come forward, or are not encouraged to do so, other students are placed at risk for abuse that can span decades. Besides the DeLuca case, there are other examples of this. One Ontario teacher had been a teacher for 26 years and had abused students at three different schools before being convicted of sexually and indecently assaulting students under the age of 14 over a 20-year span.⁹⁰ A British Columbia elementary school teacher, who was sentenced to an indeterminate period of detention as a dangerous offender, was convicted in 1985 of sexual offences involving 19 students aged 6 to 15. His offences spanned more than a decade as he moved from community to community around the province.⁹¹

D. Effects of Sexual Abuse on Students

Overview

The impact of sexual victimization on children has been widely researched and reported on in the mental health literature. Childhood, a

⁸⁷ D. Finikeshor, *Child Sexual Abuse: New Theory and Research* (New York: The Free Press, 1984).

⁸⁸ (1992), 74 C.C.C. (3d) 134 (S.C.C.).

⁸⁹ *Ibid.*, at 145.

⁹⁰ *Ontario College of Teachers v. Wark* (May 6, 1998), (OCT Discipline Committee).

⁹¹ *R. v. Noyes* (1986), 6 BCLR (2d) 306(S.C.), aff'd [1991] 1 B.C.A.C. 81.

critical period of psychological development, is the time when assumptions about self, others, and the world are being formed. Abuse can impact subsequent psychological and social maturation leading to potential dysfunctional development. A child's physical health may also be compromised by sexual abuse. The negative consequences may be amplified by the fact that offenders tend to target vulnerable children.

While sexually abused children can experience significant psychological distress and dysfunction, the impact of sexual abuse will vary considerably from person to person. While a victim may not contemporaneously display any ill effects as a result of the assaults, the possibility of delayed emergence of symptoms is becoming more widely recognized.⁹² Between ten percent and 33 percent of sexually abused children show increased symptoms over time, including some children who were symptom free at the initial assessment.⁹³

The impact is often less correlated with the severity or intrusiveness of the sexual behaviour than with the pre-abuse relationship to the abuser and the vulnerability of the victim.⁹⁴ Accordingly, a seemingly minor incident of sexual touching by a close and trusted adult can have a profound and lasting impact. Factors that may increase the negative impact of sexual abuse or harassment include the following: if the child is young, especially under 12, if the child cannot clearly attribute responsibility to the abuser, if the child feels complicity or self-blame, if the child experiences anticipatory anxiety between abusive episodes, if the child found some aspects of the abuse enjoyable, if the child dissociated during the abuse by disengaging from thoughts or feelings, if disclosure was delayed, if the response to disclosure was not supportive (especially if others fail to believe the child, blame the child or support the abuser), and if the child was in a position which required a continued

⁹² Finkelhor, *Child Sexual Abuse*, *supra*.

⁹³ *Ibid*; K.A. Kendell-Tackett, L.M. Williams & D. Finkelhor, "The impact of sexual abuse on children: a review and synthesis of recent empirical studies" (1993) 113 *Psychological Bulletin* 164.

⁹⁴ London Family Court Clinic, *Three Years After the Verdict: A Longitudinal Study of the Social and Psychosocial Adjustment of Child Witnesses Referred to the Child Witness Project* (London ON: London Family Court Clinic, 1993).

relationship with the abuser after disclosure.⁹⁵ In an Ontario study, the most troubling outcomes several years after the abuse were found in children who delayed disclosure, prolonging exposure to the abuse, and in those whose disclosures were followed by disbelief, anger, rejection by significant others, or punishment.⁹⁶

The impact of sexual abuse is best seen as an ongoing process rather than a simple event. The repercussions will typically resonate across the life span. Victims of childhood sexual abuse can re-experience symptoms during early pubescence or developing years; when the victim attempts to become sexual; when entering a sanctioned sexual relationship such as marriage; when he or she has a child; and when his or her child reaches the same age as the victim, when the abuse took place.⁹⁷

As noted earlier, the victims in the DeLuca case reported experiencing a range of effects including low self-esteem, depression, emotional and mental distress, nightmares, difficulty in developing meaningful and healthy relationships, inability to trust other individuals, flashbacks, alienation from parents and other family members and an inability to concentrate. These effects are all reported in the literature as being consistent with the psychological disturbances found in adolescents and adults abused as children. In addition, because DeLuca was a teacher, some victims did not continue their formal schooling and believe his actions limited their career opportunities. Further, many of the women abused by him continue to re-experience general symptoms of trauma as they move on in their lives. These symptoms generally fall under the following categories: shame and embarrassment, trust issues, feelings of vulnerability, emotional symptoms, and effect on sexuality.

i) Shame and Embarrassment

The stigma of sexual victimization is a key factor in explaining why victims are reluctant to disclose, and why feelings of embarrassment, guilt and self-blame may be carried for many years. Stigmatization may relate to the

⁹⁵ J. Hindman, *Just Before Dawn* (Ontario OR: AlexAndria Associates, 1989).

⁹⁶ LFCC, *Three Years After the Verdict*, *supra*.

⁹⁷ Hindman, *Just Before Dawn*, *supra*.

victim's experience of having family, fellow students and other teachers know something about the abuse, and it may also relate to how the victim feels about himself or herself as a result of the abuse. Victims may develop a sense of shame and blame from the abuser, who can convey this message by words, as in DeLuca's comment in drawing a girl's attention to his erect penis: "Look what you have done to me." Admonitions to keep the secret also convey a message of shame. Post-disclosure reactions of others may also contain messages that the victim should be embarrassed or, even worse, that the victim is blameworthy or now damaged, such as when victims are instructed or encouraged by their families to tell no one about their experiences. A victim's sense of shame may also be exacerbated by cultural and religious taboos against illicit sexual behaviour.⁹⁸

Sexual harassment in the form of sexual comments made by adults in authority, and particularly by teachers, can often lead to feelings of extreme self-consciousness, lowered self-esteem, embarrassment, and confusion, causing the victim to experience guilt and self-blame and to exhibiting caution when around others for fear of eliciting similarly embarrassing comments. This, for example, was the case when DeLuca admittedly told one student, as she filled out an application to participate in the school's co-op program, that she should list as her assets, "a nice ass, nice tits and....would be a good lay"; or, in other instances, when he commented on the size of girls' breasts.

ii) Trust Issues

Child sexual abuse has considerable psychological impact when it occurs within relationships that are expected to be protective, supportive, and nurturing. Teachers are in a position of trust and authority, much as a parent. When a teacher betrays that trust, it can be difficult for the child to trust others upon whom the child should be able to rely.⁹⁹ In the DeLuca case, the basic trust and emotional security of many of the women was arrested at a critical stage of their development. Their distrust of persons in authority continued through their remaining school years and, for some, as noted earlier, continues to the present time. This distrust manifests itself particularly

⁹⁸ D. Finkelhor & A. Browne, "The traumatic impact of child sexual abuse: a conceptual model" (1985) 55 *American Journal of Orthopsychiatry* 530.

⁹⁹ *Ibid.*

in relation to their children and their concern for them in the school environment. Some reported excessive fear and anxieties about their children's safety. The consequences of this type of breach of trust was referred to in a recent trial when a former student testified that she had no job skills because, as a result of her teacher's abuse, she was unable to trust teachers and dropped out of school at an early age.¹⁰⁰

iii) Vulnerability

Some victimized children feel vulnerable to further abuse by others, a feeling related to their inability to protect themselves the first time. This sense of vulnerability will be exacerbated in cases where they came forward and made disclosure but the adults, upon whom they relied for protection from harm, failed to protect them or were powerless to do so.

iv) Emotional Symptoms

Many of the acute symptoms of sexual abuse resemble children's common reactions to stress, such as fear, increased anger, anxiety, fatigue, depression, passivity, difficulties focusing and sustaining attention, and from withdrawal from participation and interest in usual activities. It is common for younger children to regress temporarily in response to an abusive incident, with symptoms such as anxiety or sleep problems.

In later childhood and early adolescence these signs of distress may be manifested by delinquency, drug use, promiscuity, or self-destructive behaviour. Sexually abused children may behave in a "sexualized" manner with other children and/or with toys; may engage in excessive masturbation; have age-inappropriate knowledge of sexual activity; and exhibit pronounced seductive or promiscuous behaviour. Any of these symptoms of distress may be associated with a decline or sudden change in school performance, behaviour, and peer relations.¹⁰¹

¹⁰⁰ "Sex attacks scar former students" *Toronto Star* (December 16, 1999).

¹⁰¹ D. Finkelhor & A. Browne, "Assessing the long-term impact of child sexual abuse: a review and conceptualization" in L. Walker, ed., *Handbook on Sexual Abuse of Children* (New York: Springer, 1988) 55.

v) Effect on Sexuality

Sexual abuse and harassment may detrimentally shape a child's sexuality, including both sexual feelings and sexual attitudes.¹⁰² Many of DeLuca's victims reported experiencing difficulties with intimacy and sexual relationships. Some believe that his intrusive sexual assaults affected their sexual development and hampered a normal enjoyment of sexual intimacy in their adolescent and adult relationships.

vi) The Trauma Associated with Testimony

The trauma associated with child testimony is well documented in the research literature. Students may be required to describe their sexual victimization to school staff, children's aid workers, police, as well as family and friends. Ultimately, they may need to repeat their accounts in courtrooms or in administrative hearings. As adults, they may be asked to relive their experiences as children. This can, as in the DeLuca case, bring back active memories of the abuse and trigger a host of feelings including outrage, powerlessness, depression and anxiety.

It often becomes a real ordeal for these students to recall and, in essence, relive, this sexual abuse in a formal setting, sometimes months or years later. For a variety of reasons, including emotional trauma, students, particularly children, may be unable to provide a full and accurate account to a court or administrative board. They may, indeed, be unable to testify at all, or be able to testify only at significant emotional expense.

Young children or adolescents, like adults, generally find the prospect of testifying to be a highly unpleasant experience. This experience may be preceded by months of anxiety, increasing as the hearing date nears. During this time, they may find themselves easily distracted, subject to angry

¹⁰² D. Finkelhor & A. Browne, "Assessing the long-term impact of child sexual abuse: a review and conceptualization" in L Walker, ed., *Handbook on Sexual Abuse of Children* (New York: Springer, 1988) 55.

outbursts, having disturbed sleep patterns, or they may isolate themselves from others.¹⁰³

It is well recognized that the testimonial experience can be traumatic for children. The intimidating atmosphere of a courtroom (or a boardroom), repetition of intimate details to strangers, cross-examination, fear of facing their assailants again, and physical separation from parents or trusted adults are some aspects of giving testimony that can profoundly affect child witnesses.¹⁰⁴ Some of these traumatizing aspects of giving testimony will also apply to adult complainants in individual cases.

Students who testify against teachers charged with sexual abuse commonly feel a great deal of pressure. The cases are often delayed. These are high profile cases in the community and frequently known to everyone at school. Teachers are often supported by other teachers and parents, further isolating the student. Students who have been witnesses describe the "dirty looks" or verbal harassment sometimes directed at them by a teacher's supporters.¹⁰⁵ A teacher's exemplary reputation may be presented to favour his or her credibility over that of a student. For the student who was truly victimized, this can be deeply disheartening. That student is fully aware that this exemplary reputation did not prevent the teacher from sexually mistreating him or her.¹⁰⁶

¹⁰³ Child Witness Project, *Reducing the System-Induced Trauma for Child Sexual Abuse Victims through Court Preparation, Assessment and Follow-up* (London: London Family Court Clinic, 1991).

¹⁰⁴ Nicolas Bala, "Double victims: child sexual abuse and the Canadian justice system", in W.S. Tarnopolsky, J. Whitman and M. Oullette, eds., *Discrimination in the Law and the Administration of Justice* (Montreal: Thémis, 1993) 223 at 248; Ontario, Law Reform Commission, *Report on Child Witnesses*, (Toronto: Law Reform Commission, 1991) at 70-71; Lipovsky, J.A., "The impact of court on children: Research Findings and Practical Recommendations" (1994) 9:2 *Journal of Interpersonal Violence* 238; Goodman, G., E. Pyle-Taub, D.P.H. Jones, P. England, L. Port, L. Rudy & L. Prado "Testifying in Criminal Court: The Effects on Child Sexual Abuse Victims" (1992) *Monographs of the Society for Research in Child Development*, Serial No. 229, Vol. 57, No. 5.

¹⁰⁵ LFCC, *Three Years After the Verdict*, *supra*; Catherine Stewart, "Responding to Sexual Assaults in Schools-Towards Zero Tolerance" September 1992, at 16.

¹⁰⁶ An accused's good reputation is admissible to support his or her credibility and to show the unlikelihood that he or she would commit such a crime. However, the Supreme Court

Unfortunately, the testimonial experience is frequently not confined to a day or two. Further, witnesses may be called upon to recount their ordeals at different stages of a legal proceeding and in various kinds of proceedings. Student witnesses may be called upon to describe the relevant events at a preliminary inquiry, at trial, and at disciplinary proceedings which may follow. For students who were victims of sexual misconduct by their teachers, the multiplicity of proceedings (and the delays associated with these proceedings) contributes to their emotional distress, interferes with counselling, diminishes any sense of well-being, and prevents closure.

The nature and extent of emotional impact or trauma suffered by witnesses, whether children or adults, varies in each case. There are witnesses who may regard the testimonial experience as cathartic. However, the potential for significant emotional distress or trauma in cases involving sexual misconduct is clear and incontrovertible. The ways in which witnesses, particularly children, can be accommodated in a testimonial setting to avoid or reduce such distress or trauma, consistent with the interests of the accused teacher, are addressed in Chapter IV.

Summary and Conclusion

I had him for 6th grade P.E. ... I remember how he was always so nice to me, how at lunch he would come talk to me, and at recess I'd sit by myself a lot and he come to talk to me. I was so vulnerable because I was adjusting to a divorce, trying to be the mom for my siblings, cooking, cleaning, taking care of the horses so that my dad would not have any extra stress. He knew all of this and he also knew that my grades were important to me as well as my dad. He also knew that if I got another C that my dad would sell my horse; my horse was the only stable thing I had and I did not want to lose him. He used the idea of flunking me in health to get me to comply with his needs. I was a pleaser and did not want anyone mad at me and this was his leverage. ... I told him that I was going to tell

of Canada has recognized that the propensity value of such evidence is diminished in sexual assault cases involving children since such crimes occur in private and in most cases will not be reflected in the accused's reputation for morality: *R. v. Profit* (1993), 85 C.C.C. (3d) 232 (S.C.C.).

and he said I wanted it, I liked it, that I seduced him. He said that if I told, nobody would believe me and that it would ruin his life; that he'd lose his job, mini van, house, and wife.¹⁰⁷

While the DeLuca case constituted the starting point for this review, I am aware that some educators would dismiss that case as being aberrant or out of date. They also contend that teacher sexual abuse is so rare an occurrence that attention to the issue causes more problems than it solves, problems such as false allegations by vengeful students, erosion of confidence in the profession, and the risk of alarming students and parents.

I, respectfully, cannot accept those contentions. From all I have learned during this review, I am convinced that the DeLuca case is neither aberrant or out of date. Nor can I agree that teacher sexual misconduct is not sufficiently prevalent to warrant special attention. Admittedly, this is not a comfortable topic for many people, but that is no reason to ignore it. Arguments such as these should not be allowed to forestall efforts to understand the problem, and actively address it.

At the same time, I should say again that the known incidence of sexual misconduct is small relative to the number of teachers and students, and is confined, again in relative terms, to a small, but not insignificant, number of "bad apples". The vast majority of educators, I repeat, are highly dedicated and caring individuals who seek to ensure a safe learning environment for their students. Nothing in this Report should be taken as in any way impugning their professional honour and integrity.

Nevertheless, it would be helpful to have had more research into this subject. Were more information available, I think it probable, if not certain, given the volume of unreported cases, that more students would be found to have been sexual abused or harassed than could be imagined. In short, the reported cases represent only the "tip of the iceberg".

In the final analysis, however, there is no need for precise statistics to recognize the importance of the issue. The consequences of sexual abuse can be devastating. As the literature makes clear, this kind of abuse can interrupt

¹⁰⁷ Excerpt of survivor's account taken from SESAME: Survivors of Educator Sexual Abuse Emerge (<http://members.tripod.com/~sesame3/voices.html>).

the normal development of youngsters in ways that may resonate across their lifespan. *Any* sexual misconduct in the context of the teacher-student relationship involving, as it does, so stark a power imbalance, and causing so much harm, constitutes an egregious breach of trust against which students must be protected.

Yet, the popularity of teachers, the respect in which they are held, and the loyalty of colleagues and parents, can cause others to refuse or resist accepting a child's disclosure of sexual misconduct. Some believe that virtually all allegations are a misinterpretation of innocent behaviour, or a malicious act by a spiteful student, or that they themselves could spot a true abuser. When children make such disclosures, adults, including parents, may experience feelings of denial, anger and disbelief, often leading them to deny that the abuse happened, or to blame it on the victim, or to minimize its impact or the offender's responsibility. Colleagues may have a difficult time reconciling the person they know with the behaviour they are hearing about. Tragically, failure or refusal to properly intervene can suppress additional disclosures, enhance the stigma reporting victims may already be feeling, and put other children at risk.

Certain myths and stereotypical assumptions about the nature of sexual abuse and harassment, discussed further in Chapter IV, serve to frustrate an effective response to the problem. Sexual abusers will not always be recognizable as such, victims will not always make contemporaneous disclosure, abuse and harassment will not always be carried out in a dark or secluded corner, and the effects of what appears to be "minor" abuse or harassment can have severe and long-term consequences. Gaining a better understanding of the phenomenon of child sexual abuse will ultimately assist the design of prevention initiatives and increase our effectiveness in responding to cases that come to light.

IV

THE LAW

Introduction

The best way to deal with [sexual misconduct] is to prevent it, something educators are better equipped than lawyers or judges to do. But such efforts occur against the background of societal norms, which the law both reflects and shapes.¹

The conduct of teachers in relation to their students is, to a great extent, regulated by law. Similarly, the duties and obligations of others, including fellow teachers, principals, school boards, police and social workers, to address suspected or proven sexual misconduct (and the consequences for breaching these duties and obligations) are also regulated by law. These laws may be statutes enacted by the Parliament of Canada (such as the *Criminal Code* offences which criminalize sexual abuse). They may be statutes created by the Legislature of Ontario (such as the *Ontario Human Rights Code* provisions which prohibit gender discrimination or sexual harassment.) They may be regulations, rules or by-laws which the Legislature of Ontario has delegated to others to make (such as the regulation made under the *Ontario College of Teachers Act*, 1996 defining professional misconduct by teachers). The relevant laws may also be judge-made, that is, the common law. For example, at common law, civil causes of action may render abusive teachers, and their employers, liable for damages to victims and their families.

The application of these laws to individual cases may be litigated before judges sitting with or without juries in courts of law, and before disciplinary committees or arbitrators. Different rules of procedure and evidence govern, depending upon the forum.

¹ J.P. Heubert, "Sexual harassment and racial harassment of public-school students: Federal protections and what state law may add to them" Paper presented at the annual meeting of the American Educational Research Association, New Orleans, April, 1994.

This chapter examines the laws that define and sanction sexual misconduct by teachers and that regulate the duties and obligations of third parties to address suspected or proven sexual misconduct. Do these laws adequately define, and protect against, sexual misconduct towards students? Do they do so in a way which is compatible with the rights of those suspected of misconduct to fully defend themselves? To what extent are these laws fully resorted to, to prevent sexual misconduct? Do the applicable rules of procedure and evidence adequately reduce the exposure of victims to further trauma as witnesses or to re-victimization? To what extent can these rules better protect these victims in a way which is compatible with the rights of those suspected of misconduct? These and other questions are addressed in this chapter.

I have not described all of the laws that might have application to cases of sexual misconduct but, instead, have focused on those laws which have particular relevance to my recommendations. Apart from applicable laws, the conduct of teachers and others may also be *guided* by policies or protocols. Though such policies, protocols or procedures may not be binding in law, they represent another important tool in identifying and preventing sexual misconduct and in protecting those victimized by such misconduct. Existing and recommended policies, protocols and procedures are discussed in Chapter VI.

A. Criminal Law: Defining and Sanctioning the Sexual Offender

Overview

The *Criminal Code of Canada*² creates various offences which potentially criminalize the sexual abuse by teachers upon students. These crimes are classified as (a) indictable; (b) summary conviction; or (c) dual procedure or hybrid. Dual procedure or hybrid offences may be proceeded with as indictable offences or as summary conviction offences, at the option of the prosecution.

² R.S.C. 1985, c. C-46, as amended.

Indictable offences are more serious offences. Each indictable offence has its own penalty provision. Indictable offences carry maximum terms of imprisonment of two, five, ten, 14 years, or life. Summary conviction offences generally carry a maximum term of six months imprisonment. The maximum sentences for hybrid offences vary, depending upon whether they are proceeded with as indictable or summary conviction offences. As well, several hybrid offences (such as sexual assault), when proceeded with summarily, carry maximum sentences of 18 months imprisonment.³

Summary conviction offences and hybrid offences which are proceeded with summarily, are tried by provincial court judges. In Ontario, these are judges of the Ontario Court of Justice.

The indictable offences discussed in this Report are *elective* offences, which means that the accused may elect to be tried by a provincial court judge, or may elect to be tried by a superior court judge alone or sitting with a jury. In Ontario, superior court judges are judges of the Superior Court of Justice. Where the accused elects to be tried by a superior court judge, with or without a jury, he or she may also have a preliminary inquiry before a provincial court judge. At the preliminary inquiry, evidence is presented which may justify an order of committal, sending the accused on to trial. Thus, a decision by the prosecution to proceed by indictment may compel the complainant to testify at least twice.

i) Sexual Interference and Invitation to Sexual Touching

Sexual interference and invitation to touching are both offences which victimize children under 14. Since these crimes are commonly confused, it may simply be said, at the outset, that sexual interference generally involves an adult who touches a child for a sexual purpose; invitation to touching generally involves an adult inducing a child to touch him or her. Often, both crimes are committed in the course of the same events.

³ Unless otherwise indicated in this Report, the maximum term of imprisonment for offences described in this Report which may be proceeded with summarily is six months imprisonment.

Section 151 provides that every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 14 years is guilty of a crime.

Section 152 provides that every person who, for a sexual purpose, invites, counsels or incites a person under the age of 14 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person (including either the perpetrator's body or the child's body) is guilty of a crime.

Both crimes are hybrid offences. Where the prosecution elects to proceed by indictment, each carries a ten-year maximum term of imprisonment.

Typically, these sections criminalize the touching of a young child's private parts or inviting a young child to touch the perpetrator's private parts, when either is done for a sexual purpose. However, commission of these offences does not necessarily involve the private parts of either the perpetrator or the young child. For example, a teacher who strokes a young pupil's hair *for a sexual purpose* is guilty of a crime. The sexual motivation behind otherwise equivocal conduct may be inferred from the surrounding circumstances, including any accompanying words or gestures, other actions which precede or follow the touching or a pattern of similar conduct with that child or others which belies an innocent explanation.⁴

It is no defence that a child who is under 14 years of age purportedly consented to the activity.⁵

Some touching, such as stroking a child's body on top of his or her clothing, may be preliminary to more physically intrusive sexual activity. On the other hand, it may be an end in and of itself. In either situation, sentencing

⁴ The admissibility of discreditable conduct other than the subject matter of the charge under consideration (commonly referred to as "similar fact evidence") is governed by the common law and need not be further elaborated upon in this Report.

⁵ Section 150.1 (1). (Section 150.1(2) creates an exception that could have no application to teachers.) It is also no defence that the accused believed that the child was 14 years of age or more unless the accused took all reasonable steps to ascertain the child's age: section 150.1(4). Again, this defence has no practical application to a teacher.

judges tend to place heavy emphasis upon the absence of more physically intrusive activity in fixing an appropriate sentence. While this is an important factor in the exercise of sentencing discretion, judges should remain mindful of the severe psychological and emotional trauma which may result from activity which may be characterized as minimally intrusive. As reflected in Chapter III and in the DeLuca case itself, the nature of the sexual activity is but one factor affecting the severity of trauma to the victim.⁶

ii) Sexual exploitation

Section 153 provides that the very same conduct, that is, the conduct described above, when done for a sexual purpose, is also a crime when committed by a person who is in a *position of trust or authority* towards a *young person*⁷ (meaning a person at least 14 years old but under 18 years of age). This offence is a hybrid offence. Where the prosecution elects to proceed by indictment, this crime carries a five year maximum term of imprisonment.

Again, it is no defence that the young person purportedly consented to the activity.⁸

In *R. v. Audet*,⁹ the Supreme Court of Canada considered the meaning and scope of the phrase “position of trust or authority” in the context of the teacher-student relationship. Audet engaged in sexual activity with a 14-year-old student during the summer holidays. He had been the complainant’s physical education teacher. The school year had ended just a few days earlier. All indications suggested that Audet would again be her teacher in the following school year. It was the defence position that he was not in a position

⁶ See *R. v. M.(G.)* (1992), 11 O.R. (3d) 225 (C.A.).

⁷ The section also applies to a person with whom the young person is in a position of dependency. Section 153.1(1) also criminalizes conduct by a person who is in a position of trust or authority towards a person with a mental or physical disability, or who is a person with whom a person with a mental or physical disability is in a relationship of dependency.

⁸ Section 150.1(1). It is also no defence that the accused believed that the young person was 18 years of age or more unless the accused took all reasonable steps to ascertain the young person’s age: section 150.1(5).

⁹ (1996), 106 C.C.C. (3d) 481 (S.C.C.).

of trust or authority at the relevant time and, in any event, had not used any such position to induce the young person to participate in sexual activity. Accordingly, it was said that the activity was consensual and constituted no crime. The trial judge acquitted Audet. The New Brunswick Court of Appeal upheld the acquittal.

On further appeal by the Crown, the Supreme Court of Canada entered a conviction against Audet for sexual exploitation. In doing so, it made clear that, absent exceptional circumstances, teachers are in a position of trust or authority in relation to their students. As such, teachers are absolutely prohibited in law from any sexual activity with their students under 18 years old, regardless of whether their students purportedly consented to the activity and regardless of whether the teacher actually used his position of trust or authority to bring about the sexual activity.

At the material time, Audet remained in a position of trust or authority respecting the complainant, though the sexual activity took place while he was off-duty and, indeed, during the summer holidays. *Ross v. New Brunswick School District No. 15*¹⁰ explains and illustrates why teachers will, apart from exceptional circumstances, be in a position of trust and authority towards their students:

Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole.¹¹

Teachers will be in a position of trust and authority towards their students in the vast majority of cases. Indeed, a teacher will be presumed to

¹⁰ (1996), 133 D.L.R. (4th) 1.

¹¹ *Ibid*, at 20.

be in such a position of trust and authority, absent evidence adduced to the contrary.¹²

In some cases, difficulties may arise in determining when a position of trust or authority begins and ends. The age difference between the accused and the young person, the evolution of their relationship and, above all, the status of the accused in relation to the young person will be relevant factors in making this determination.¹³

Though the Court in *Audet* did not formulate the precise limits of the phrase "position of trust", it can be concluded from the broad interpretation given to this phrase that teachers remain in a position of trust or authority with respect to their own students under the age of 18 years, even where their activities take place off school property, while they are off-duty or during summer holidays. Teachers, I would think, also remain in a position of trust or authority towards a student even if the student is not scheduled to again be in the teacher's class but is to remain a student at the school. This conclusion logically follows from the totality of circumstances, including the status of teachers in relation to all students at their school.

School employees, other than teachers, as well as school volunteers, will also often be in a position of trust or authority respecting students with whom they interrelate. Some, such as coaching assistants, are almost inevitably in such a position.

iii) Indecent Acts and Sexual Exposure

Section 173 provides that every one who wilfully does an indecent act in a public place in the presence of one or more persons or, in any place, with

¹² *R. v. Audet*, *supra* at 501-503.

¹³ Parliament chose not to prohibit sexual activity with a young person by referring to the *status of the accused* in relation to the young person, as was recommended in the Badgley Report: Canada, *Sexual offences against children: Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa: Minister of Supply and Services Canada, 1984). Hence, the status of the accused as teacher in relation to a student is important (and presumptively establishes a position of trust or authority) but not determinative.

an intention to insult or offend any person is guilty of a crime.¹⁴ Further, every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of 14 years, is guilty of a crime.¹⁵ These are purely summary conviction offences.

These offences criminalize indecent acts or exposure, even absent any suggested or actual physical contact between the perpetrator and another person.

Indecent acts are said to be those which the community does not tolerate, considering the potential harm which will accrue from exposure to these acts.¹⁶

iv) Sexual Assault and Related Offences

Section 271 provides that every one who commits a sexual assault is guilty of a hybrid offence. As an indictable offence, sexual assault attracts a maximum term of ten years imprisonment. As a summary conviction offence, it attracts a maximum term of 18 months. Sexual assaults which involve a weapon or which cause bodily harm are purely indictable offences which may attract a term of 14 years imprisonment.¹⁷ Sexual assaults involving the wounding, maiming, disfigurement of the complainant or endangerment of his or her life ("aggravated sexual assaults") may attract imprisonment for life.¹⁸ Again, these are purely indictable offences.

Sexual assault is, in essence, an assault committed in circumstances of a sexual nature such as to violate the sexual integrity of its victim.¹⁹ An assault is an intentional touching or application of force, done without valid

¹⁴ Section 173(1).

¹⁵ Section 173(2).

¹⁶ *R. v. Jacob* (1996), 112 C.C.C. (3d) 1 (Ont. C.A.).

¹⁷ Section 272. Sexual assaults involving threats to cause bodily harm to a person other than the complainant or multiple perpetrators may attract similar punishment.

¹⁸ Section 273.

¹⁹ *R. v. Chase* (1987), 37 C.C.C. (3d) 97 (S.C.C.). Assault is defined in section 265(1).

consent and with knowledge, recklessness or wilful blindness as to the victim's lack of consent.²⁰

The determination of whether an assault is committed in circumstances of a sexual nature is *objective*. All the circumstances surrounding the accused's conduct are to be considered in determining whether the conduct is of a sexual nature and violates the complainant's sexual integrity. These circumstances include the body part touched, the nature of the contact, any words or gestures, including threats, which accompanied the conduct and the accused's intent or purpose, including the presence or absence of sexual gratification. However, a sexual purpose or motive, while a relevant factor, is not required. So, for example, a misguided and primitive disciplinary exercise which violates the sexual integrity of its victim may be a sexual assault, though not motivated by sexual gratification.²¹

As well, as is the case with other sexual offences earlier described, the elements which convert an assault into a sexual assault need not involve a touching of the victim's private parts or, indeed, a touching with the accused's private parts. So, for example, the rubbing of the victim's shoulders, without valid consent, accompanied by a sexual purpose or lascivious words would normally constitute a sexual assault.

Generally, valid consent, for the purposes of the sexual assault provisions, means the voluntary agreement of the complainant to engage in the sexual activity in question.²²

There is no consent where a teacher induces a student to engage in sexual activity by abusing his or her position of trust, power or authority;

²⁰ The requirement that the accused act with knowledge, recklessness or wilful blindness as to the victim's lack of consent gives rise to a potential defence of "an honest but mistaken belief in consent" discussed below. It is no defence to a charge of sexual assault causing bodily harm or aggravated sexual assault that the complainant purportedly consented. One cannot consent to bodily harm: *R. v. Welch* (1995), 101 C.C.C. (3d) 216 (Ont. C.A.).

²¹ See *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.); *R. v. V. (K.B.)* (1993), 82 C.C.C. (3d) 382 (S.C.C.); *R. v. S. (P.L.)* (1991), 64 C.C.C. (3d) 193 (S.C.C.); *R. v. Chase* (1987), 37 C.C.C. (3d) 97 (S.C.C.); *R. v. Alderton* (1985), 17 C.C.C. (3d) 204 (Ont. C.A.).

²² Section 273.1(1). Section 273.1(2) articulates circumstances in which no consent is obtained. See also 273.1(3) and 265(3).

there is no consent where the student submits or does not resist by reason of the exercise of authority by the teacher.

There is no such thing as "implied consent". If the complainant, in his or her own mind, did not consent to the sexual activity, he or she cannot be deemed to have consented because he or she failed to actively resist or protest.²³

Again, where the complainant is a child under 14 years old, it is no defence that the child purportedly consented to the activity.²⁴

Even where the complainant did not actually consent, there is limited scope for a defence of "apprehended consent", that is, that the accused held an honest but mistaken belief that the complainant consented. Of course, the accused must honestly believe that a valid consent was present so, for example, an honest belief that a 13-year-old consented affords no defence.

The *Criminal Code* further restricts the availability of the defence of apprehended consent. It is no defence to sexual assault that the accused believed that the complainant consented to activity that forms the subject-matter of the charge where:

- (a) the accused's belief arose from his or her self-induced intoxication; or
- (b) the accused's belief arose from his or her recklessness or wilful blindness;²⁵ or
- (c) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.²⁶

²³ *R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 (S.C.C.).

²⁴ Section 150.1(1).

²⁵ See also *R. v. Sansregret* (1985), 18 C.C.C. (3d) 223 (S.C.C.).

²⁶ Section 273.2.

In other words, the defence is only available where the accused believed that the complainant affirmatively communicated, by words or action, consent to engage in the relevant sexual activity. A belief that silence, passivity or ambiguous conduct constitutes consent is not a defence. Also, the accused may not rely upon a purported belief that the complainant's express lack of agreement to sexual touching actually constituted an invitation to more persistent and aggressive contact. Once the complainant has expressed unwillingness to engage in sexual contact, the accused should make certain that the complainant has truly changed his or her mind before proceeding further. The accused may not rely on a mere lapse of time or the complainant's silence or equivocal conduct to indicate that the complainant has had a change of heart and, hence, consents. The accused is also not able to engage in further sexual touching to "test the waters".²⁷

Conduct may amount to a crime under multiple statutory provisions which have been described above. For example, behaviour which amounts to sexual interference may also constitute a sexual assault. Though sexual assault requires proof of an act done without consent, a child under 14 cannot provide valid consent. The prosecution can therefore seek a conviction on either charge.

Behaviour which amounts to sexual exploitation may or may not constitute a sexual assault. The accused, who is in a position of trust or authority, may have engaged in sexual activity with a young person under the age of 18 and thereby committed sexual exploitation, notwithstanding the complainant's consent. This same conduct will only amount to a sexual assault, where the accused abused or exercised his or her position so as to vitiate consent. Where those circumstances exist, the prosecution can seek a conviction on either charge.

Where alternative charges exist, the prosecution may seek a conviction for the more serious offence, namely, sexual assault. Such a conviction may more appropriately reflect the gravity of the conduct and support the imposition of a greater penalty. Conversely, even where the defence admits wrongdoing, it may attempt to negotiate a plea of guilt to a lesser offence to reflect the accused's position that only the less serious offence was committed, or to minimize the content of the accused's criminal record or to

²⁷ *R. v. Ewanchuk, supra.*

support a less onerous penalty. Plea negotiations may also involve agreement that some charges be withdrawn in exchange for pleas of guilt on other charges. The DeLuca proceedings are illustrative.

Unlike sexual interference, invitation to touching and sexual exploitation, the offence of sexual assault may be committed by a teacher upon a student or former student who has reached the age of 18. The fact that a student has reached that age has some relevance to whether the teacher remains in a position of trust or authority.²⁸ Nonetheless, leaving aside adult or continuing education programs which raise somewhat different issues, a teacher is likely to remain in a position of trust or authority respecting a student who has attained the age of 18. Where the teacher has exercised or abused that position so as to vitiate consent, a sexual assault has been committed.

Throughout this Report, unless the context indicates otherwise, all of the crimes which have been outlined above collectively, are described as "sexual offences". However, it should be noted that sexual assault, in its various forms, as set out in sections 271 to 273, is contained in Part VIII of the *Criminal Code* (Offences against the Person) and not in Part V (Sexual Offences). This reflects Parliament's important acknowledgment that sexual assault is, in essence, a crime of violence or aggression.

All these offences may be committed by either gender and against victims of either gender.

v) Historical Sexual Offences

No statute of limitations exists in Canada to prevent the prosecution of individuals for historical sexual abuse, that is, sexual abuse which took place some years ago. These individuals must be prosecuted under the *Criminal Code* provisions which then existed.²⁹ Hence, this Report contains

²⁸ It is unnecessary to decide whether a teacher is presumptively in a position of trust or authority respecting a student who is 18 years of age or older. *Audet* was not addressing this issue, which could not arise in the context of sexual exploitation.

²⁹ See, for example, Bill C-127 (*An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125), section 33: An offence

references to crimes such as indecent assault which existed at the material time but have been superseded.³⁰

vi) Miscellaneous Crimes

In addition to the above crimes, the *Criminal Code* contains other offences which are incidentally committed by a sexual abuser. Several are referred to here.

Section 163.1 provides that every person who makes, prints, publishes, possesses for the purpose of publication,³¹ imports, distributes, sells or possesses for the purpose of distribution or sale³² any child pornography³³ is guilty of a crime. These are hybrid offences, which attract a maximum term of ten years imprisonment, when proceeded with by indictment.

Child pornography is commonly used by an abuser to "groom" young victims.³⁴

Section 163.1(4) also provides that the simple possession of child pornography is a crime, albeit less serious than the other child pornography

committed prior to January 4, 1983 against any provision of law affected by this Act shall be dealt with in all respects as if this Act had not come into force.

³⁰ Some of these pre-existing provisions reflected anachronistic notions. For example, the offence of rape was differentiated from an indecent assault based upon whether penetration had taken place. The "unchaste" character of the complainant affected whether certain sexual activity was or was not criminal.

³¹ Section 163.1(2).

³² Section 163.1(3).

³³ "Child pornography" is defined in section 163.1(1).

³⁴ See excerpt of testimony of Dr. Peter Ian Collins, an expert in forensic psychiatry and, particularly in sexual deviance and pedophilia in *R. v. Sharpe* (1999), 136 C.C.C. (3d) 97 at 130-132 (B.C. C.A.), notice of appeal to Supreme Court of Canada as of right filed July 8, 1999, 1999 S.C.C.A. No. 352 (QL).

offences.³⁵ The Supreme Court of Canada will soon decide whether the simple possession of child pornography survives scrutiny under the *Canadian Charter of Rights and Freedoms* in a case that has attracted considerable media attention, *R. v. Sharpe*.³⁶ Whatever the merits of that *Charter* challenge, Parliament was clearly justified in enacting legislation to protect children from the abuse and exploitation occasioned by the production and dissemination of child pornography.³⁷

In the past year, at least two Ontario teachers have lost their teaching certificates after being convicted of child pornography offences.³⁸

Section 163(1) criminalizes, amongst other things, the distribution of obscene material, which includes any publication, a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.³⁹ Section 168 criminalizes the use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous. These are all hybrid offences. As indictable offences, they may attract a sentence of up to two years imprisonment.⁴⁰

The form of imagery contemplated by sections 163 and 163.1 is not restricted to magazines, photographs and videos, but also extends to electronically-generated material. As a result, individuals who down-load pornographic images of children from the Internet, digitize them through the

³⁵ Again, this is a hybrid offence, with a maximum term of five years imprisonment, when proceeded with by indictment.

³⁶ *R. v. Sharpe, supra*.

³⁷ *Ibid.* at 153 per Rowles J.A.

³⁸ Ontario College of Teachers, "Discipline Decisions" (June, 1999) *Professionally Speaking* (<http://www.oct.on.ca/english/ps/PS9/front.htm>); "Ex-teacher jailed over child porn" *London Free Press* (July 3, 1999).

³⁹ Section 163(8).

⁴⁰ Section 169.

use of a scanner or digital camera, and forward them to others through e-mail may also face criminal consequences under section 163 and 163.1.⁴¹

Section 372 creates the summary conviction offences of making indecent telephone calls⁴² or making harassing telephone calls.⁴³

Section 264 prohibits criminal harassment (repeatedly following or contacting individuals, besetting or watching certain locations or threatening) that causes another person reasonably to fear for their safety or the safety of anyone known to them. This is a hybrid offence, exposing the accused, when proceeded with by indictment, to a maximum of five years imprisonment.

vii) Orders of Prohibition

Section 161 of the *Criminal Code* provides for orders of prohibition upon findings of guilt for certain sexual offences. My focus is on section 161(1)(b), which is important to my mandate. Section 161 provides that, where an accused is found guilty of sexual interference, invitation to sexual touching, or any of the various forms of sexual assault⁴⁴, respecting a child under 14 years of age, in addition to any other sentence that may be imposed for that offence, the sentencing judge *shall consider* making and *may* make an order prohibiting the offender from

- (a) attending certain locations, including a daycare centre, or school ground,⁴⁵ or
- (b) *seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or*

⁴¹ See: *R. v. Weir*, [1998] A.J. No. 155 (Q.B.) (QL); *R. v. Hurtubise*, [1997] B.C.J. No. 40 (S.C.) (QL).

⁴² Section 372(2). Presumably, this section also extends to the sending of an indecent e-mail over the telephone line.

⁴³ Section 372(3).

⁴⁴ Other predicate offences, irrelevant to this Report, are not noted here.

⁴⁵ Section 161(1)(a).

*becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 14 years*⁴⁶

for life or for any shorter period the court considers desirable.⁴⁷

The order may be subject to conditions or exemptions⁴⁸ and may be later varied because of changed circumstances.⁴⁹

Non-compliance by a person bound by an order of prohibition is itself a crime.⁵⁰

In *R. v. Heywood*,⁵¹ the Supreme Court of Canada considered the constitutional validity of section 179(1)(b) of the *Criminal Code*, which makes it an offence for persons who have been convicted of certain enumerated offences to “[loiter] in or near a school ground, playground, public park or bathing area”. The reasons for judgment in that case referred to section 161 (which had only recently been enacted and was not in issue) as “a good example of legislation which is much more carefully and narrowly fashioned to achieve the same objective as in section 179(1)(b)”⁵² and as, “a powerful means of enhancing public safety and aiding offender treatment”.⁵³

Despite the fact that judges *must* consider whether to make an order under section 161, the section has received little judicial consideration since its enactment in 1993. In two reported cases, neither of which involved

⁴⁶ Section 161(1)(b).

⁴⁷ Section 161(2).

⁴⁸ Section 161(1).

⁴⁹ Section 161(3).

⁵⁰ Section 161(4).

⁵¹ (1994), 94 C.C.C. (3d) 481 (S.C.C.).

⁵² *Ibid.* at 521 and 523.

⁵³ *Ibid.* at 495.

perpetrators employed or volunteers in a position of trust or authority towards persons under the age of 14 years, the sentencing judges declined to make a section 161 order in the absence of evidence that the offender had been diagnosed as a pedophile⁵⁴ or, in the least, posed a future threat to children in the prescribed locales.⁵⁵

In another case,⁵⁶ a school bus driver was convicted of sexual assault and inviting to touching respecting a 13-year-old student passenger. The accused grabbed the student's top as if to look down inside and requested sexual favours, including fellatio, on many occasions. Though the trial judge found the offences to involve a breach a trust, he declined to make a section 161 order:

He will I expect never obtain employment or even a volunteer job in which he will have contact with children, *that is if the potential employer does a proper check.*

...

[B]ecause this is the accused's first offence, he is of previously excellent background, there is no evidence of any sexual deviancy and that he has in the past been heavily involved in community affairs and that I find the offenses here to be at the very low end of the seriousness scale and is not likely to be repeated, such an order need not be imposed.⁵⁷ [Emphasis added]

With respect, if a "proper check" should result in the accused never obtaining employment or volunteer work with children, it is difficult to understand why a section 161 order should not be imposed to better ensure that result. In my view of the reasons, they place inadequate weight upon the nature of the offences, the gross breach of trust involved, and the unsuitability

⁵⁴ *R. v. M.(M.G.)*, [1997] B.C.J. No. 2446 (Prov. Ct.) (QL).

⁵⁵ *R. v. Rodgers*, [1999] N.J. No. 115 (S.C. T.D.) (QL).

⁵⁶ *R. v. Geddes*, [1999] O.J. No. 4419 (Ont.Ct.) (QL).

⁵⁷ *Ibid.*, at paras. 16 and 24.

of this accused for future involvement, whether permanently or for a fixed number of years, with children.

The point to be made here is that a prohibition order is not dependent upon proof that the defendant is a pedophile or a demonstrable risk in the future. First, as reflected in Chapter III, there is no single "molester profile" and the origins of sexually abusive behaviours are variable. Sexual offences against young children are more commonly committed by persons who are not pedophiles but who molest children because they are morally and sexually indiscriminate and opportunistic. The absence of pedophilia provides inadequate assurance that these crimes will not be repeated. Second, and more important, where a prohibition order is sought under section 161(1)(b), any purported need for evidence of pedophilia or future risk (over and above the evidence of the crime itself) misconceives the fundamental nature of a position of trust or authority. In the teacher-student context, teachers are role models and inextricably linked to the perceived integrity of the school system. They exert considerable influence over their students. Even off-duty conduct may cause a loss of public confidence in the teacher and in the educational system incompatible with a functioning school environment. Further, students are entitled to feel safe and secure in their school environment.

In my view, perpetrators who commit the crimes listed in section 161 (together with additional offences reflected in my recommendations) should, in the interest of children's safety, generally be disqualified from employment, or from serving as volunteers in a capacity that involves being in a position of trust or authority towards children. The length and conditions of disqualification should depend upon the circumstances of each case.

Section 161(1)(b) represents an important tool in enhancing public safety and student security. Though a criminal finding of guilt often results in a teacher's dismissal and in the revocation of the teacher's certificate, a judicial order prohibiting continued employment as a teacher, where appropriate, may facilitate the expeditious resolution of disciplinary proceedings and spare the teacher's victims further trauma. Equally important, the Ontario College of Teachers (the "College") or the teacher's school board have no power to prevent a dismissed teacher from employment, or from serving as a volunteer, in a position of trust or authority towards children unrelated to teaching. Use of section 161(1)(b) to address these scenarios is, again, consistent with children's safety. In my view, prosecutors

and sentencing judges need to be more mindful of section 161's appropriate scope and application.⁵⁸

Further, it is difficult to explain why section 161 should only be available where sexual offences are committed respecting children under the age of 14 or why it is not available where the accused has been convicted of child pornography offences under sections 163.1(2) and (3) or of sexual exploitation of a person with a disability under section 153.1(1) of the *Criminal Code*. My recommendations address these deficiencies.

Recommendations 1 to 4: Orders of prohibition

- 1. Ontario prosecutors should specifically be instructed on the existence and appropriate use of section 161(1)(b) of the *Criminal Code*. It may be advisable for the Ministry of the Attorney General to emphasize the importance of section 161(1)(b) in its Crown Policy Manual.**
- 2. In the circumstances outlined in section 161(1)(b) of the *Criminal Code*, sentencing judges *shall* consider making, and may make, an order of prohibition. Sentencing judges should be alert to the existence of section 161(1) and its use in appropriate cases.**
- 3. Evidence, medical or otherwise, that the accused is a pedophile or a demonstrable risk to children, while relevant, is not a precondition to the imposition of an order of prohibition under section 161(1)(b) of the *Criminal Code*. Where an order of prohibition is considered under section 161(1)(b) of the *Criminal Code*, a sentencing judge should be mindful of the potential emotional and psychological effect upon the well-being and security of children, should the accused seek, obtain or continue any employment or become a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 14 years.**

⁵⁸ See also Ontario, *Child Abuse Screening Mechanisms Project: Discussion Document* (Toronto: Queen's Printer for Ontario, 1994), at 22.

4. The Government of Ontario should support, through its ongoing consultations with the Government of Canada, amendments to section 161 of the *Criminal Code* to provide that:

- (a) it extend to an offender convicted or discharged on the conditions prescribed in a probation order under section 730, of an offence under subsections 153.1(1), 163.1(2) and 163.1(3) in addition to those offences presently listed in section 161, in respect of a person who is under the age of 14 years.
- (b) where an offender is convicted or discharged on the conditions prescribed in a probation order under section 730,⁵⁹ of an offence under section 153, subsection 153.1(1), 155 or 159, subsection 160(2), subsections 163.1(2) and 163.1(3) or section 170, 171, 271, 272, 273 or 280, in respect of a person who is under the age of 18 years, the court shall consider making and may make, subject to the conditions and exemptions that the court directs, an order prohibiting the offender from

seeking, obtaining or continuing any employment, whether or not the employment is remunerated or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 18 years.

⁵⁹ For certain offences, the court may find the accused guilty and grant an absolute or conditional discharge, rather than convicting the accused. Where a conditional discharge is granted, conditions may be prescribed in a probation order: sections 730(1) and 731(2).

B. Ontario Human Rights Legislation

Overview

The *Ontario Human Rights Code*⁶⁰ ("Code") recognizes the rights of persons in Ontario to equal treatment without discrimination on the basis of certain enumerated grounds. It specifically addresses sexual discrimination, sexual harassment, sexual solicitations, advances and reprisals. A complaint to the Ontario Human Rights Commission may result in proceedings before an independent board of inquiry constituted under the *Code*. Where the complaint is proven, the *Code* provides for a wide range of monetary and non-monetary remedies to rectify infringements and compensate the victims of discrimination.

Some of the *Code*'s provisions are capable of being utilized by students seeking a remedy for sexual misconduct by their teachers but, in practice, understandably, are not resorted to. Nonetheless, it remains important to examine the provisions of the *Code* and to appreciate its significance in the student - teacher relationship.

The *Code* demonstrates Ontario's commitment to human rights and, by section 47(2), establishes the *Code*'s primacy over other Ontario legislation. As well, the *Code* provides important interpretive guidance in other proceedings. For example, conduct by a teacher towards a student which infringes the *Code* should also be interpreted as professional misconduct within the meaning of the *Ontario College of Teachers Act*, 1996 and its regulation. Similarly, arbitrators under the *Labour Relations Act*, 1995⁶¹ are explicitly empowered to interpret and apply the *Code* in determining whether a school board had just cause for dismissing a teacher or for imposing disciplinary measures short of dismissal.⁶² In fact, the *Code* has primacy over collective agreements between school boards and teachers'

⁶⁰ R.S.O. 1990, c. H.19, as amended.

⁶¹ S.O. 1995, c. 1, Schedule A, as amended.

⁶² Section 54 of the *Labour Relations Act*, 1995.

unions.⁶³ Put simply, Ontario's human rights legislation will be interpreted and applied in proceedings which may result in a teacher being decertified, dismissed or otherwise sanctioned.

i) Sexual Solicitations, Advances and Reprisals

Section 7(3) provides that every person has a right to be free from,

- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

There is no doubt that section 7(3) has direct application to the teacher-student relationship. Teachers are well-positioned to confer, grant or deny a benefit or advancement to their students to facilitate sexual abuse and its suppression. Teachers are also well-positioned to retaliate against students for their rejection of sexual solicitations or advances. DeLuca's conduct, which included what I described earlier as "quid pro quo" harassment, graphically demonstrates how a teacher can both reward students for their submissiveness or silence and punish them for their resistance or disclosures to others.

A single sexual advance or solicitation may constitute an infringement of section 7(3) of the *Code*. The section does not require proof of an ongoing course of conduct.⁶⁴ As well, proof of an infringement under section 7(3)(a) would not appear to require evidence that the person who is in a position to confer, grant or deny benefits or advancements, in fact, did so, or threatened to do so. Such persons simply cannot make unwelcome sexual advances or solicitations to those whom they can affect through benefits or advancements.

⁶³ S. 48(12)(j) of the *Labour Relations Act*, 1995.

⁶⁴ *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 (Bd. of Inquiry).

ii) Sex Discrimination and Sexual Harassment Generally

Sexual harassment is often manifested in ways other than direct solicitations or advances.

In 1996, the Ontario Human Rights Commission established its Policies and Guidelines regulating Sexual Harassment and Inappropriate Gender-Related Comments and Conduct. The following passages from the policy illustrate the breadth of conduct which amounts to sexual harassment:⁶⁵

...[S]exual harassment is often interpreted as objectionable comments or conduct of a "sexual" nature. However, sexual harassment, in the broader context of unequal treatment based on gender, may refer to instances where the behaviour is not overtly sexual in nature, but is related to the person's gender, and demeans or causes personal humiliation or embarrassment to the recipient.

Examples of sexual harassment and inappropriate gender-related behaviour within the meaning of the *Code* include, but are not limited to, comments, gestures and non-verbal behaviour, visual materials, and physical contact. The following is not an exhaustive list but should assist in identifying what may constitute sexual harassment or inappropriate gender-related comments and conduct:

- (i) gender-related comments about the individual's physical characteristics or mannerisms
- (ii) unwelcome physical contact
- (iii) suggestive or offensive remarks or innuendoes about members of a specific gender

⁶⁵ Ontario Human Rights Commission, *Policies and Guidelines Regulating Sexual Harassment and Inappropriate Gender-Related Comments and Conduct* (1996) (Toronto: Ontario Human Rights Commission, 1996). Though the Commission's interpretation of the *Code* is not binding upon the Board of Inquiry constituted to hear claims brought before it (to which Commission counsel are generally parties), these passages conform to decisions rendered by the Board and the courts.

- (iv) propositions of physical intimacy
- (v) gender-related verbal abuse, threats, or taunting
- (vi) leering or inappropriate staring
- (vii) bragging about sexual prowess
- (viii) demands for dates or sexual favours
- (ix) offensive jokes or comments of a sexual nature about an employee, client or tenant
- (x) display of sexually offensive pictures, graffiti or other materials
- (xi) questions or discussions about sexual activities
- (xii) paternalism based upon gender which a person feels undermines his or her self-respect or position of responsibility
- (xiii) rough and vulgar humour or language related to gender

A situation could arise in which particular comments or actions might not be intended to offend another person, but result in a violation of that person's rights under the *Code*. The reason for this is that intention is not a prerequisite to establishing that the treatment is discriminatory. Rather the Commission looks to the effect or the result of the comments or actions on the recipient.

Example: Even the best intentioned "compliments" regarding a woman's appearance, hair, clothes etc., if made on a repeated basis in the work environment, or during a formal business meeting, can set a woman apart as different. Such comments also undermine her credibility as a professional.

Most of these forms of sexual harassment were allegedly engaged in by DeLuca, including the following:

- pointing to the bulge in his trousers, and commenting to a student, "this is what you do to me;

- telling a student, "you're a cock teaser when I thought you would be a cock pleaser";
- asking a student if she ever "sucked on a man's dick";
- suggesting that a student list her assets on an application form as "a nice ass, nice tits and a good lay";
- constantly staring, smiling and winking at a student;
- commenting on how beautiful or pretty students were, or that they had a "nice ass" or "big chest" or "big boobs";
- commenting that he intended to teach a student how to kiss or that he wanted to be the first male to kiss a student;
- indicating to a student that she would get high marks if she slept with him;
- encouraging a student to take his class, assuring her that she would do well and her marks would be high;
- asking a student if she was "horny";
- noting that a student was wearing a bra and attempting to guess its size;
- threatening to deny a student permission to go on a school field trip, if she didn't go into a supply room with him.

Sexual harassment *in the workplace* is expressly prohibited by section 7(2) of the *Code*. It provides that every person who is an *employee* has a right to freedom from sexual harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee. Sexual harassment of persons who occupy accommodations by the landlord or agent of the landlord or by an occupant of the same building is also expressly prohibited: section 7(1). However, sexual harassment in schools is not expressly prohibited. The question therefore arises whether sexual harassment

in schools (other than solicitations, advances or reprisals) constitutes an infringement of the *Ontario Human Rights Code*.

The jurisprudence supports the conclusion that sexual harassment of students by teachers constitutes *sexual discrimination* within the meaning of section 1 of the *Code*.

Section 1 provides that every person has a right to equal treatment with respect to *services*, goods and facilities, without discrimination because of sex (or other enumerated grounds). Education has been held to be a service.⁶⁶ Therefore, a teacher who *discriminates* against a student because of his or her sex infringes the *Code*.⁶⁷

It is important to the analysis which follows to note that section 5(1) of the *Code* similarly provides that every person has a right to equal treatment with respect to *employment* without discrimination because of sex (or other enumerated grounds).

In *Janzen v. Platy Enterprises Ltd.*,⁶⁸ the Supreme Court of Canada considered whether sexual harassment in the workplace is discrimination on the basis of sex, and therefore prohibited by section 6(1) of the *Manitoba Human Rights Act*⁶⁹ which, at the relevant time, was similar to section 5(1) of the *Ontario Human Rights Code*. The Manitoba legislation made no express mention of harassment.⁷⁰

⁶⁶ *Peel Bd. of Education v. Ontario (Human Rights Comm.)* (1990), 72 O.R. (2d) 593 (Div.Ct.); *Lanark, Leeds and Grenville Roman Catholic Separate School Board v. Ontario (Human Rights Commission)* (1987), 8 C.H.R.R.D. 4235 (Ont.Div.Ct.), aff'd (1989), 10 C.H.R.R. D/6336 (Ont. C.A.); *Sehdev v. Bayview Glen Junior School* (1988), 9 C.H.R.R. D/4881 (Ont. Bd. of Inquiry); *Ross v. New Brunswick School District No. 15* (1996), 133 D.L.R. (4th) 1 (S.C.C.).

⁶⁷ Section 9.

⁶⁸ (1989), 59 D.L.R. (4th) 352.

⁶⁹ S.M. 1974, c.65, as amended.

⁷⁰ Subsequent to the adjudication of the complaints in issue, the Manitoba legislation was replaced with the *Manitoba Human Rights Code*. Section 19 of the present *Manitoba Human Rights Code* prohibits harassment in any activity to which the *Code* applies: C.C.S.M., c. H175, as amended.

The appellants were employed as waitresses at a restaurant. They were sexually harassed by another employee who touched various parts of their bodies and made sexual advances towards them.

The appellants' award against the offending person's employer (which had been reversed by the Manitoba Court of Appeal) was restored by the Supreme Court of Canada, which concluded that sexual harassment of the sort to which the appellants were subjected constitutes sexual discrimination. This result accords with the extensive jurisprudence and literature from Canada and the United States. Amendments to various human rights acts prohibiting sexual harassment were only intended to make express and explicit what had previously been implicit. The Court also rejected the contention that sexual harassment would not amount to sex discrimination unless all employees of the same gender were equally subjected to it.⁷¹

Similarly, jurisprudence under the *Ontario Human Rights Code* has definitively established that sexual harassment which creates a "poisoned work environment" constitutes sexual discrimination under section 5(1).⁷²

If sexual harassment which poisons the work environment constitutes sexual discrimination under section 5(1), it inevitably follows that sexual harassment by teachers of students which poisons the school environment constitutes sexual discrimination with respect to services under section 1.⁷³

⁷¹ *Janzen v. Platy Enterprises Ltd.*, *supra*.

⁷² For example: *Bell v. Ladas* (1980), 1 C.H.R.R. D/155 (Bd. of Inquiry); *Bruce v. McGuire Truck Stop* (1993), 20 C.H.R.R. D/145 (Bd. of Inquiry); *Hughes v. Dollar Snack Bar* (1981), 3 C.H.R.R. D/1014 (Bd. of Inquiry). Though cases do speak of the need to show that the conduct created a poisoned environment to constitute discrimination, *Janzen* does not favour this interpretation. Indeed, the Supreme Court of Canada did not find the quid pro quo/hostile work environment dichotomy particularly helpful. The distinction may have been useful at one point to illustrate the range of behaviour that constitutes harassment before sexual harassment was widely viewed as actionable. Now, there is no need to characterize harassment as one of these forms: *Janzen v. Platy Enterprises Ltd.*, *supra*, at 374-375.

⁷³ See *Mahmoodi v. University of British Columbia* (1999), 36 C.H.R.R. D/8; *Dupuis v. British Columbia (Ministry of Forests)* (1993), 20 C.H.R.R. D/87 (B.C.C.H.R.); *Quebec (Commission des droits de la personne) v. Habachi* (1992), 18 C.H.R.R. D/485 (Que. Trib.).

This result should not be surprising given the obvious parallels between the workplace and the school. As earlier discussed, a “power relationship” almost inevitably exists in the school environment. Students, female and male, are subject to the authority of their teachers. Sexual harassment can and often does diminish a student’s status and reputation in the eyes of other students. For example, a student’s physical appearance or maturity is offered up by others in the school environment as somehow justifying or explaining why they are targets. As the DeLuca case illustrates, sexual harassment also negatively affects students’ performance, and their sense of personal dignity and physical and emotional well-being.

In summary, a teacher’s sexually offensive conduct towards a student, which may not amount to a sexual solicitation, advance or reprisal under section 7(3) but which does amount to sexual harassment may constitute sexual discrimination and therefore an infringement of section 1 of the *Code*.⁷⁴

iii) Defining “Harassment” and “Sexual Harassment”

In *Janzen*, after reviewing the various definitions of sexual harassment articulated in the literature and jurisprudence, the Supreme Court of Canada concluded:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is...an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with

⁷⁴ The characterization of an infringement as sexual discrimination, rather than sexual harassment, also has importance, where, for example, the complainant seeks to establish corporate liability for the harassment committed by one employee upon another. Pursuant to section 45 of the *Code*, vicarious liability has no application to a section 7 infringement, but continues to have application to a section 1 or section 5(1) infringement. This is further discussed when the duties and obligations of third parties, such as school boards, are addressed.

unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.⁷⁵

The *Ontario Human Rights Code* does not specifically define "sexual harassment". The term "harassment" is defined under section 10 to mean, "*a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome*".⁷⁶

Sexual harassment would therefore involve these components:

- (a) a course of vexatious comment or conduct
- (b) of a sexual nature
- (c) that is known or ought reasonably be known to be unwelcome.

An isolated or single event is therefore unlikely to constitute a "course of comment or conduct" within the meaning of section 10 of the *Code*.⁷⁷ However, it may be significant enough to form the basis of a claim of sexual discrimination under the *Code*.

Conduct need not make reference to another person's gender or be explicitly sexual to be properly characterized as sexual harassment. For example, pejorative comments about another person's appearance may be based upon sex.⁷⁸

⁷⁵ *Janzen v. Platy Enterprises Ltd.*, *supra*, at 375.

⁷⁶ This definition applies to all forms of harassment addressed under the *Code*, including sexual harassment.

⁷⁷ Compare section 7(3). As earlier noted, a single sexual advance or solicitation by a person in a position to confer, grant or deny a benefit or advancement to his/her student may constitute an infringement of section 7(3) of the *Code*. The section does not require proof of an ongoing course of conduct.

⁷⁸ *Shaw v. Levac Supply Ltd.* (1990), 14 C.H.R.R. D/35 (Ont. Bd. of Inquiry).

Under the *Code*, the definition of harassment imports notions of both subjectivity and objectivity. "Vexatious" may be synonymous with "annoying" or "distressing". The complainant must subjectively find the behaviour vexatious. The respondent must have known (a subjective test) or ought reasonably to have known (an objective test) that the behaviour is unwelcome.⁷⁹

Of course, where the complainant has clearly indicated to the respondent that the behaviour is unwelcome, it may easily be determined that the respondent knew. Some behaviour would be patently unwelcome to the complainant and permits the inference that the respondent knew that. In "power relationships" such as that of an employer-employee or teacher-student, the behaviour may be unacceptable, but endured.⁸⁰ There may be no resistance or articulated objection to the behaviour. In these circumstances, the respondent may contend that it has not been shown that he or she knew or "ought to have known" that the behaviour was unwelcome. All of the circumstances need be considered in assessing whether the respondent "ought to have known". Although the complainant's response to the behaviour may have relevance to whether the respondent "ought to have known" it was unwelcome, it should be remembered that it is not the complainant's responsibility to articulate for the respondent what has been established as unacceptable conduct. As one Board of Inquiry has stated:

In general, the legislative enunciation of the right to be free from sexual harassment and advances indicates a public awareness of the unacceptable nature of this behaviour and carries with it an expectation that this understanding is shared by the members of the community.⁸¹

Where a sexual harassment policy exists for teachers, it would be difficult, if not impossible, for a teacher to maintain that he or she did not know or ought not to have known that conduct which violates this policy was unwelcome. The need for a clear sexual harassment policy governing all

⁷⁹ *Cuff v. Gypsy Restaurant*, *supra*.

⁸⁰ See *Quebec (Commission des droits de la personne) v. Larouche* (1993), 20 C.H.R.R. D/1 (Que.Trib.).

⁸¹ *Cuff v. Gypsy Restaurant*, *supra* at D/3981-3982.

Ontario teachers, other school employees and volunteers forms the subject of a later recommendation.

iv) Remedies

The *Code's* remedial provisions are broad. Under section 41(1)(a), a party found to have contravened the *Code* could be directed to do anything that would achieve compliance with the *Code*, respecting both the complaint and future practices. This might include, in appropriate cases, mandated attendance by the teacher at training sessions on human rights and sexual harassment.¹² A school board could be directed to implement a sexual harassment policy. Indeed, where the school board or its officials knew or were in possession of knowledge from which they ought to have known of harassment under section 7 of the Act, and had the authority by reasonably available means to penalize or prevent the conduct and failed to use it, the board of inquiry shall remain seized of the matter and, based upon further findings, may later impose further sanctions or take measures to prevent any further continuation or repetition of the infringement.¹³

Under section 41(1)(b), a party found to have contravened the *Code* may be directed to make restitution, including monetary compensation, for losses arising out of the infringement. The complainant can receive two kinds of monetary compensation: special or general damages, and, damages for mental anguish. Special damages could include, for example, the costs associated with professional counselling. General damages should reflect the loss of the complainant's right not to be discriminated against, which has an intrinsic value. Where the infringement has been engaged in wilfully or recklessly (most usually the case for sexual harassment), compensation not exceeding \$10,000 may also be awarded for mental anguish. Though section 41(1)(b) limits compensation for mental anguish to \$10,000, it does not restrict the number of such awards. Such an award can be made separately for each infringement and in relation to each respondent.

A school board may be found directly liable based upon conduct carried out by one of its "directing minds" in the course of his or her duties.

¹² *Donaldson v. 463963 Ontario Ltd.* (January 14, 1994), No. 583 (Ont. Bd. of Inquiry).

¹³ Section 41(2) of the *Code*.

For example, a principal or supervisor who knew about, and failed to act upon, a teacher's sexual harassment could make the school board, as well as himself or herself, liable under the *Code*. A school board may also be held vicariously liable for the acts of its employees.⁸⁴

v) Use of the *Code* to Address Sexual Harassment of Students by Teachers

In practice, complaints by students against teachers or school boards alleging sexual harassment or abuse are not heard by boards of inquiry constituted under the *Ontario Human Rights Code*. This may reflect a number of realities. Students are inhibited for a number of reasons, as indicated earlier, from disclosing sexual abuse or harassment. Where the misconduct is non-criminal, there is even less motivation for them to disclose the misconduct. Students may have little or no familiarity with the *Ontario Human Rights Code* or their rights thereunder. Conversely, the systemic delays in processing and investigating complaints to the Ontario Human Rights Commission may well discourage potential claimants. This particularly obtains for students who move on from particular classes or schools and may be less likely to initiate school-based complaints, particularly those which will be delayed.

Ceilings on monetary compensation for mental anguish (and the precedents for damage awards) make civil proceedings a more attractive alternative.

⁸⁴ There is conflicting authority on the applicability of vicarious liability to sexual harassment claims. Generally, employers are in the best position to prevent and address harassment. Therefore, it is consistent with the remedial objectives of human rights legislation to hold employers vicariously liable for an employee's sexual harassment: *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84. Section 45(1) of the Code deems the actions performed in the course of employment by a corporation's officers, officials, employees or agents to be the actions of the corporation. However, infringements under section 2(2), 5(2) and 7 (all harassment provisions) are exempted. There are conflicting decisions on the effect of section 45(1): Compare, for example *Shaw v. Levac Supply Ltd.* (1990), 91 C.L.L.C. 17,007 (Ont. Bd. of Inquiry) to *Henwood v. Gerry Van Wart Sales Inc. and Saggese* 95 C.L.L.C. 230-011 (Ont. Bd. of Inquiry). In any event, section 45(1) does not exempt section 1 infringements.

Even where a complaint has been made, the Commission may decide not to deal with it and therefore not refer the subject-matter of the complaint to the board of inquiry.⁸⁵

Although it appears that sexual misconduct by teachers will often represent the ultimate discriminatory act against their students, and that boards of inquiry under the *Code* have the expertise to evaluate claims of discrimination, it is unlikely that proceedings under the *Code* will represent, at least in the near future, a major vehicle for redressing sexual abuse or harassment committed by teachers.

That being said, human rights proceedings may be a more attractive vehicle for remedial orders against school boards within which sexual harassment is condoned or left unredressed or where such boards fail to implement adequate policies to address sexual harassment. Indeed, it is well arguable that a school board's responsibilities under the *Code* compel it to rectify harassment through taking disciplinary action or through the development of appropriate policies and educational initiatives.⁸⁶

Conclusion

I return to the opening theme of this section of the Report. The *Code* demonstrates Ontario's commitment to human rights and the equality values which require protection. It sets standards for conduct which have fundamental importance to the school environment. In my view, educators and students need be better educated both as to the values reflected in the *Ontario Human Rights Code*, and the types of conduct which infringe the *Code*. This requires, in the least, that sexual harassment policies exist throughout Ontario which regulate the conduct of educators and school volunteers. Though there undoubtedly may be distinctions drawn between

⁸⁵ For example, the Commission may conclude that the complaint is one that could or should be more appropriately dealt with under another Act or where the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

⁸⁶ Ontario Human Rights Commission, *Policies and Guidelines Regulating Sexual Harassment*, *supra*.

protocols for addressing sexual harassment in different communities, depending upon local resources or personnel, the content of sexual harassment policies throughout Ontario should, in most respects, be the same. After all, sexual harassment or abuse in Thunder Bay is sexual harassment or abuse in Toronto. The rights contained in the *Ontario Human Rights Code* are held by every Ontario student.

Though this review is concerned with sexual abuse or harassment by teachers against students, it is important to recognize that students may sexually harass other students on a daily basis. A school environment which is not respectful of the rights of everyone to be free from discriminatory comments or conduct is more likely to condone sexual abuse or harassment by teachers and students. Accordingly, I also strongly encourage school boards to implement, in consultation with all interested parties, sexual harassment policies which regulate the conduct of students.

The *Ontario Human Rights Code* should inform the content of sexual harassment policies. The *Code's* provisions and the supporting jurisprudence, clarify what sexual harassment is and educate those to whom the policies apply.

However, the *Code* cannot exhaustively articulate the appropriate sexual boundaries for teachers in their relationships with students. Here, there is a distinction between the workplace and the school. Though the power imbalance between employers or supervisors and their employees requires care in ensuring that a position of authority is not misused, the law does not prohibit social or sexual relationships between employers or supervisors and their adult employees.⁸⁷ This explains the requirement that conduct be "unwelcome" to constitute sexual harassment or discrimination in the workplace. Indeed, "harassment" or "discrimination" may intrinsically involve conduct which is unwelcome to another person (whether or not the person who finds the conduct vexatious is the person to whom the conduct was directed).⁸⁸ Such "unwelcome" conduct would also constitute harassment or discrimination in the school setting. However, it must be remembered that

⁸⁷ See *Dupuis v. British Columbia (Ministry of Forests)*, *supra*.

⁸⁸ It may be that offensive comments directed to one person may be unwelcome to another and constitute harassment or discrimination nonetheless: *Cuff v. Gypsy Restaurant*, *supra* at D/3981.

sexual relationships and certain social relationships between teachers and students are inappropriate, regardless of whether the affected students regard them as "unwelcome". For example, no teacher should make sexual advances to a young student, whether or not the student finds the advances unwelcome. Highly sexualized comments by teachers are completely inappropriate in the school environment, regardless of an individual student's reaction. The *Ontario Human Rights Code* represents an important starting point for defining the appropriate boundaries of teacher-student relationships. These boundaries are further elaborated upon later in this Report.

C. The *Child and Family Services Act*

i) Inflicting Child Abuse

Section 79(2) of the *Child and Family Services Act*⁸⁹ ("CFSAct") makes it an offence for someone *having charge of a child* to inflict *abuse* on that child or, by failing to care and provide for or supervise and protect the child adequately, to permit the child to suffer abuse. For the purposes of this section, abuse means "a state or condition of being physically harmed, sexually molested or sexually exploited."⁹⁰ A person who contravenes section 79(2), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than two years, or to both.⁹¹

A child is defined as a person under the age of 16 years.⁹²

⁸⁹ R.S.O. 1990, c. C.11. The CFSAct has recently been amended: *Child and Family Services Amendment Act (Child Welfare Reform)*, 1999, S.O. 1999, c. 2. While these amendments are not in force as of February 29, 2000, they are expected to be in force shortly, and they have therefore been incorporated into this Report.

⁹⁰ Section 79(1) of the CFSAct. However, the maximum age is 18 years if a child has been the subject of a child protection order under Part III of the CFSAct.

⁹¹ A school board is a corporation under section 58.5(1) of the *Education Act*.

⁹² Section 37(1) of the CFSAct.

It follows that a teacher who sexually abuses his or her student has committed a section 79(2) offence if found to have had *charge* of the child at the material time.⁹³ However, cases which are properly prosecutable as sexual abuse crimes will normally generally be dealt with under the *Criminal Code*, and not under the *CFSAct*. Accordingly, it is unnecessary to further discuss section 79(2) for the purposes of this Report.

ii) The Duty to Report

The *CFSAct* governs the reporting, investigation and management of child protection cases in Ontario. Educators, by virtue of their ongoing contact with children and their position of trust, play a well-recognized role in detecting and reporting suspected domestic child abuse or neglect. Their obligation to report suspected abuse by fellow teachers raises significant issues which are the focus of this Report.

Section 72 of the *CFSAct* imposes a statutory duty on *every person* to report certain suspicions of child abuse, and the information upon which those suspicions are based, to a children's aid society. In addition, section 72 makes it an offence for *certain professionals* to fail to so report. The scope and effect of section 72 has been the subject of considerable comment by various interested parties during this review and need be elaborated upon here.

Section 72(1) creates the statutory duty to report. It reads, in part:

(1) Despite the provisions of any other Act, if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall forthwith report the suspicion and the information on which it is based to a society:

...

3. The child has been sexually molested or sexually exploited, by the person having charge of the child or by another person where the person having charge of the child knows or

⁹³ The issue whether a teacher or another school employee has "charge" of a child also arises in the context of the duty to report suspected abuse and is addressed in that context.

should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child.

4. There is a risk that the child is likely to be sexually molested or sexually exploited as described in paragraph 3.

...

6. The child has suffered emotional harm, demonstrated by serious,

- i. anxiety,
- ii. depression,
- iii. withdrawal,
- iv. self-destructive or aggressive behaviour, or
- v. delayed development,

and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

...

8. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.⁹⁴

⁹⁴ Section 72, prior to the recent amendment, also imposed a duty upon any person to report. However, the threshold test involved a *belief*, on reasonable grounds. The lower threshold of reasonable grounds to *suspect* applied to professionals only. The legislation, as amended, continues to impose liability on professionals only, but imposes the same threshold test for everyone.

The duty to report is ongoing:

- (2) A person who has additional reasonable grounds to suspect one of the matters set out in subsection (1) shall make a further report under subsection (1) even if he or she has made previous reports with respect to the same child.

The person who has a duty to report must do so *directly* to a children's aid society:

- (3) A person who has a duty to report a matter under subsection (1) or (2) shall make the report directly to the society and shall not rely on any other person to report on his or her behalf.

Information which a party would otherwise keep in confidence, such as the content of sessions with a guidance counsellor, must nonetheless be reported:

- (7) This section applies although the information reported may be confidential or privileged, and no action for making the report shall be instituted against a person who acts in accordance with this section unless the person acts maliciously or without reasonable grounds for the suspicion.⁹⁵

The protection contained in section 72(7) is not limited to civil proceedings, but applies to professional disciplinary proceedings as well.⁹⁶

Sections 72(4) and (5) create the offence of failing to report applicable to persons who perform professional or official duties respecting children.

⁹⁵ Section 72(8) provides that "nothing in this section abrogates any privilege that may exist between a solicitor and his or her client."

⁹⁶ *Dunlop v. Police Commissioners* (1996), 26 O.R. (3d) 582 (Div. Ct.).

Section 72(6.1) extends liability to certain other parties who authorize, permit or concur in the failure to report. The relevant sections state:

(4) A person referred to in subsection (5) is guilty of an offence if,

(a) he or she contravenes subsection (1) or (2) by not reporting a suspicion; and

(b) the information on which it was based was obtained in the course of his or her professional or official duties.

(5) Subsection (4) applies to every person who performs professional or official duties with respect to children including,

...

(b) a teacher, school principal, social worker, family counsellor, priest, rabbi, member of the clergy, operator or employee of a day nursery and youth and recreation worker;

(c) a peace officer and a coroner;

...

(e) a service provider and an employee of a service provider.

(6) In clause (5) (b), "youth and recreation worker" does not include a volunteer.

(6.1) A director, officer or employee of a corporation who authorizes, permits or concurs in a contravention of an offence under subsection (4) by an employee of the corporation is guilty of an offence.

(6.2) A person convicted of an offence under subsection (4) or (6.1) is liable to a fine of not more than \$1,000.

The Duty to Report in the Educational Context

Section 72(1): “a person, including a person who performs professional or official duties with respect to children”

Every school official, supervisory officer and employee and, indeed, a school volunteer, has the duty to report. Section 72(1) draws no distinction in that regard.

Section 72(1): “reasonable grounds to suspect”

There is no doubt that this threshold is a relatively low one. Indeed, section 72, prior to the recent amendment, imposed the general duty to report on people who had reasonable grounds to *believe*, a higher standard. The lower threshold of reasonable grounds to *suspect* applied only to persons who perform professional or official duties respecting children. The threshold test is now a uniform one.

Some have suggested that this low threshold, and the fear among educators that they will be prosecuted for failing to report, results in a “culture of over-reporting” and an abdication of the exercise of any discretion to screen out patently frivolous complaints or to independently assess whether the conduct complained of is truly reportable. It is said that over-reporting results in gratuitous harm to a teacher’s dignity, reputation and ability or desire to teach.

Section 72 is designed, of course, to provide a moral and legal incentive to early reporting of suspected child abuse which, in turn, makes it more likely that such abuse will be identified and ended early. The legislation is intended to put the best interests of the child first. A standard of “reasonable grounds to suspect”, a requirement that reporting be done “forthwith” and that there need only be reasonable grounds to suspect that “there is a risk” of future sexual abuse all support an approach that favours early, outside intervention.⁹⁷ Further, putting children’s safety first necessarily means that there will be cases reported to a children’s aid society that

⁹⁷ See also Ontario, *Protecting Vulnerable Children: Report of the Panel of Experts on Child Protection* (Toronto: Ministry of Community and Social Services, 1998) (Chair: Judge Mary Jane Hatton).

ultimately, after investigation, will not warrant criminal or disciplinary proceedings. This is inevitable. However, in my view, section 72 contemplates a limited scope for some preliminary evaluation by the school before a report is made.⁹⁸

A report is not mandated upon mere suspicion or conjecture but upon *reasonable grounds* to suspect. *Reasonable grounds* imports some objective and articulable basis for one's suspicions. Put succinctly, while the threshold is a low one, it does not contemplate the automatic reporting of any information communicated, regardless of its ambiguity or patent falsehood. This assumes that the decisions not to report are made free from stereotypical notions about student unreliability or a failure to appreciate the kinds of grooming activities that may evidence a risk of sexual abuse. The theme here is a recurring one throughout this Report: education and training of educators, together with an understanding of the laws and policies which are applicable, are likely to produce fairer and just results.

Section 72(1): "forthwith"

Educators are obligated to report "forthwith". The meaning of the term "forthwith" was considered in *R. v. Rapai and Girard*.⁹⁹ A school principal and school superintendent were charged with failure to report under the *CDSA* because they delayed reporting a complaint of abuse against a teacher for seven days while they investigated the complaint. The teacher had been removed from the classroom during the investigation. In acquitting the principal and superintendent, the court held that the meaning of "forthwith" will depend upon the facts of each case. In certain cases, it is acceptable for a teacher, principal or school board to make some inquiries in order to ascertain whether he or she had reasonable grounds to suspect abuse has occurred. The court stated that some sort of inquiry is more likely to be acceptable in circumstances where the complaint is of a less serious nature and

⁹⁸ The purpose of the preliminary evaluation is to ensure that the threshold test is met, and that the conduct alleged is truly reportable. Once it has been determined that the conduct is reportable (to either the police or children's aid society), it is the role of *these* authorities, and not school officials, to investigate the conduct.

⁹⁹ An unreported decision of the Ontario Court, Provincial Division, released January 20, 1993.

is very vague, or where the school board is able to control the situation, for example, by removing a teacher from the classroom pending an investigation.

The term "forthwith" has been interpreted in various criminal cases. It may mean "immediately" or "within a reasonable time", depending upon the legal context and the factual circumstances.¹⁰⁰ In my view, the term favours early reporting but does not exclude some preliminary evaluation by a school official to determine whether there are reasonable grounds to suspect that the child has been abused or is at risk of being abused.

Section 72(1): "the child has been sexually molested or sexually exploited"

First, the obligation to report arises respecting a "child" which the *CDSA* defines as someone under the age of 16. It is therefore important that school policies and protocols address the analogous situation where an educator reasonably suspects that a teacher is sexually exploiting or otherwise abusing an older student. (As earlier noted, the criminal offence of sexual exploitation involves young persons under the age of 18.)

Second, sexual molestation or sexual exploitation are not defined in the *CDSA*. It is clear that conduct by a teacher that would amount to sexual interference, invitation to touching, sexual exploitation or sexual assault under the *Criminal Code* would constitute sexual molestation or sexual exploitation. Of course, any sexual relationship with a student under the age of 16 constitutes sexual exploitation.

Elsewhere in this Report, I use the term "sexual misconduct" to embrace the full range of offensive activities of a sexual nature that teachers could engage in. The term "sexual abuse" is a narrower term which may not be suitable to describe some offensive conduct of a sexual nature which nonetheless should be proscribed. The point here is that sexual molestation and exploitation constitute abuse. Section 72 was intended to impose a reporting requirement upon suspicion of conduct that deserves to be

¹⁰⁰ *R. v. Grant* (1991), 67 C.C.C. (3d) 268 (S.C.C.); *R. v. Bernshaw* (1995), 95 C.C.C. (3d) 404.

characterized as “abuse” and not for all sexual misconduct by teachers.¹⁰¹ This accords with one of the underlying purposes of the legislation, namely, to ensure that children in need of protection by children’s aid societies receive it through early intervention. Well-trained school officials, principals and the Ontario College of Teachers should be well-situated to address other kinds of sexual misconduct in the employment or disciplinary context.

An appropriate understanding of the jurisdiction and role of children’s aid societies and the reporting requirement represent another means of minimizing over-reporting.

Having said that, there will be circumstances where a complaint that falls short of a criminal allegation may nonetheless trigger an obligation to report. For example, where there are reasonable grounds to suspect that a teacher’s conduct, as described by a student or fellow teacher, does not constitute, in and of itself, sexual molestation or exploitation, but evidences that it is taking place or is intended to facilitate such abuse in the future (e.g. grooming activities), then such conduct may well be reportable either under section 72(1) 3 or under 72(1) 4.¹⁰²

Here, the lines are far from clear, particularly when it is known that grooming activities are designed to “test the waters” through conduct easily characterized as innocuous or ambiguous. Ultimately, one must recognize that section 72 is not designed to entirely preclude educators from the

¹⁰¹ This interpretation accords with section 79 of the *CDSA* which, for its purposes, defines abuse as a “a state or condition of being physically harmed, sexually molested or sexually exploited.” It is also significant that section 72(3), prior to the recent amendment, defined a professional’s reporting obligation to exist where that person has reasonable grounds to suspect that a child is or may be suffering or may have suffered abuse. “To suffer abuse” in this context, meant to be in need of protection: Section 72(1). Rather than refer back to a definition of a child in need of protection, the present legislation articulates when a child is in need of protection for reporting purposes within section 72 itself.

I have also reproduced sections 72(1)6 and 8, which address emotional harm manifested by serious indicia or the risk of such harm arising out of the conduct of a person in charge. There are circumstances where non-criminal conduct, such as sexual harassment, might produce such emotional harm and, as such, constitute reportable conduct.

¹⁰² Paragraph 4 imposes the duty to report where “there is a risk that the child is likely to be sexually molested or sexually exploited as described in paragraph 3”.

exercise of good judgment; but it is designed to put the best interests of children first and foremost. Indeed, the recent amendments to section 72 replace "substantial risk" with "risk", again lowering the reporting threshold.

Section 72(1): "by the person having charge of the child"

There is only a duty to report abuse suspected which is at the hands of a person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of abuse but fails to protect the child. Teachers and principals are likely characterized as persons having charge of a child for the purposes of section 72 of the *CDSA*.¹⁰³ An interpretation of this phrase to include only parents or guardians would be unwarranted and inconsistent with the purpose and plain meaning of the section. The issue whether certain other school employees, such as maintenance staff, volunteers or school bus drivers, would constitute persons having charge of a child remains unresolved. The answer is likely dependent upon the factual context of each case. For example, a school volunteer may well be a person in charge of a student in some situations, given that volunteer's role and assumed responsibilities respecting the student.

It is difficult to see why any person who is employed or is a volunteer in a capacity that involves being in a position of trust or authority towards students, or who has unsupervised access to students during school-related activities, should be immunized from being reported under section 72.

The restriction of the reporting requirement to cases involving persons having charge of a child has been the subject of criticism:

I recognize that abuse by one having charge of the child, such as a day care worker, constitutes, in a sense, a breach of the trust of the child and perhaps of the parents. But the continuing risk to the child may

¹⁰³ *R. v. Kates*, [1987] O.J. No. 2032 (Dist.Ct.)(QL). See also *R. v. Aitken* (May 29, 1996) Stratford (Ont.Prov.Div.) [unreported] and *R. v. Rapai and Girard*, *supra*, where educators were charged under the *CDSA* with failing to report alleged abuse by a teacher. Although the accused in both of the educator cases were acquitted at trial, no issue was raised whether a teacher was "a person having charge of the child".

be just as great even though the abusing person does not have charge of the child.¹⁰⁴

Many other provinces do not restrict the duty to report to cases involving a person having charge of the child.¹⁰⁵ The need for early identification and prevention of sexual abuse is, of course, not confined to cases involving persons in charge.

Recommendation 5: “Persons in charge” under the *CFSAct*

5. Consideration should be given to amending section 72 of the *Child and Family Services Act* to delete the requirement that suspected abuse be related to a “person in charge of a child”. Alternatively, it should be made clear that persons who are employed or are volunteers in a capacity that involves being in a position of trust or authority towards students or that involves unsupervised access to such students respecting school-related activities are persons in charge of those students for the purposes of section 72 of the Act.

Section 72(5): “every person who performs professional or official duties with respect to children”

Section 72(5)(b) expressly provides that teachers and principals are persons who perform professional or official duties with respect to children. In my view, it is also clear that supervisory officers are persons who perform professional or official duties with respect to children.¹⁰⁶

¹⁰⁴ Judge H. Ward Allen, *Judicial Inquiry into the Care of Kim Anne Popen by the Children's Aid Society of the City of Sarnia and the County of Lambton* (Toronto: Queen's Printer for Ontario, 1982), vol. 4, at 1473-74.

¹⁰⁵ British Columbia (*Child, Family and Community Service Act*, R.S.B.C. 1996, c.46, s. 14); Manitoba (*Child and Family Services Act*, C.C.S.M. c.80, ss. 17-18); New Brunswick (*Family Services Act*, S.N.B. 1980 c. F-2.2, s. 30); Nova Scotia (*Children and Family Services Act*, R.S.N.S. 1990, c.5, s. 25).

¹⁰⁶ In *R. v. Rapai and Girard, supra*, this was assumed.

Further, pursuant to section 72(6.1), a director, officer or employee of a corporation, which includes a school board, who authorizes, permits or concurs in a professional's failure to report suspected abuse is also guilty of an offence. Accordingly, school board officials may be liable, regardless of whether they themselves would be required to report.

Section 72(4): "in the course of his or her professional or official duties"

This phrase has been interpreted broadly. In *Police Complaints Commissioner v. Dunlop*,¹⁰⁷ a police officer overheard other police officers discussing allegations of abuse that a person had made in a statement to police. The Ontario Divisional Court held that the officer had obtained the information in the statement "in the course of his professional or official duties", even though he was not the officer assigned to the case in which the statement was taken. The Court said that "all police officers have a primary duty to prevent the commission of crime". Similarly, a teacher who overhears a conversation at school giving rise to a suspicion of abuse, or who is approached by a member of the community and given information regarding possible abuse by reason of his or her status as a teacher, will likely be found to have obtained this information "in the course of his or her professional or official duties".

This section of the Report is concerned with the duty to report under the *Child and Family Services Act*. It is appropriate, in the context of this statutory duty to report to an outside agency, that a distinction be drawn between sexual abuse (which must be reported to a children's aid society) and other forms of sexual misconduct. However, to be clear, a teacher's duty towards his or her students under the *Education Act*, the *Teaching Profession Act* or the *Ontario College of Teachers Act*, 1996 requires that a teacher intervene to protect a student from being victimized by any sexual misconduct in the school environment. That duty, as will be later discussed, might involve various forms of intervention, including reporting to a principal or a supervisory officer.

¹⁰⁷ (1996), 26 O.R. (3d) 582.

D. Education-related Statutes

Overview

Earlier in this chapter, I examined the *Criminal Code*, which defines various sexual offences and sanctions the perpetrators. I analyzed the *Ontario Human Rights Code* which defines sexual harassment and discrimination. Finally, I reviewed the *Child and Family Services Act* which imposes an obligation upon everyone to report suspected child abuse and, for professionals who work with children, creates an offence for failing to do so. Most of these provisions do not explicitly refer to school boards, teachers, principals, other school employees or volunteers, but have application to them.

It is important to now consider what the legislation that specifically regulates educators says both about teacher-student sexual misconduct and about the obligation of fellow educators and school boards to address suspected or known sexual misconduct.

In Ontario, the *Education Act*,¹⁰⁸ the *Teaching Profession Act*¹⁰⁹ and the *Ontario College of Teachers Act, 1996*¹¹⁰ all play a role in regulating the conduct of the educational community.¹¹¹ The duties of educators and their school boards are, to varying degrees, defined in each statute or in the regulations thereunder. The legislative articulation of these duties is intended to inform educators as to the standards expected of them, and to form a basis for disciplinary proceedings against educators where there has been a significant breach of these duties. Disciplinary proceedings may be of two kinds: those relating to employment and those relating to professional status.

¹⁰⁸ R.S.O. 1990, c. E.2, as amended.

¹⁰⁹ R.S.O. 1990, c. T.2, as amended.

¹¹⁰ S.O. 1996, c. C12, as amended.

¹¹¹ The Ontario educational system has been the subject of significant legislative changes in the past few years, primarily through passage of the *Ontario College of Teachers Act, 1996* and the *Education Quality Improvement Act (Bill 160)*. These changes have been fully incorporated into this Report.

The distinctions between these forms of discipline, and how they interrelate, are discussed below.

To what extent does this legislation adequately define sexual misconduct for educators and the duties of school boards or fellow educators to address suspected or known sexual misconduct? To what extent are these issues more appropriately addressed in the policies and protocols of each school board? These questions are dealt with in the sections and chapters that follow.

In brief, it is my view that the definition of sexual misconduct and the duties of those who suspect or know about sexual misconduct need to be better articulated, both in legislative provisions and in policies and protocols. A definition of sexual misconduct must be informed (but not limited) by those provisions of the *Criminal Code* and *Ontario Human Rights Code* earlier discussed. Similarly, the nature and extent of the duties of school boards, teaching colleagues, principals and supervisory officers to identify and prevent teacher-student sexual misconduct must be informed (but not limited) by the obligations under the *Child and Family Services Act*.

First, I examine what the education-related legislation has to say about sexual misconduct and make recommendations in that regard. Then, I examine the duties and obligations of school boards, their officers and staff to identify and prevent sexual misconduct. Though those duties and obligations are somewhat extensive, only those necessary to explain my recommendations are elaborated upon here.

i) Defining and Sanctioning Sexual Misconduct

The Education Act

The *Education Act* is the primary statute regulating the Ontario school system. It sets out the duties of school boards¹¹² and their teachers, principals and supervisory officers. It also creates the framework for the collective

¹¹² Unless the context suggests otherwise, references to school boards in this Report should be taken to include school authorities. A school authority includes, in addition to a district school board, boards of a rural separate school or separate school zone, a Protestant separate school, a secondary school district, and a school on exempt lands.

bargaining process between teachers, as employees, and school boards, as employers.

The Act defines a teacher as "a member of the Ontario College of Teachers".¹¹³ Principals and supervisory officers are also teachers.¹¹⁴ Accordingly, the statutory duties imposed upon *teachers* are also applicable to *principals* and *supervisory officers*.¹¹⁵ Other employees, such as custodians, and certain office personnel, student teachers and volunteers are not governed by the *Education Act*.

Section 264(1)(c) sets out the obligation of teachers to set a positive example for the moral development of their students. It reads:

Duties of teacher

264.--(1) It is the duty of a teacher and a temporary teacher,

...

religion and morals

- (c) to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues.

¹¹³ Section 1(1).

¹¹⁴ Business supervisory officers, with whom this Report is not concerned, do represent an exception: O.Reg. 309, s. 3(1).

¹¹⁵ Additional duties imposed upon principals and supervisory officers are addressed elsewhere.

In *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15, (the "Bhadauria case")*,¹¹⁶ the Supreme Court of Canada said the following about section 264(1)(c):

The language is that of another era. The requirements it sets for teachers reflect the ideal and not the minimal standard. They are so idealistically high that even the most conscientious, earnest and diligent teacher could not meet all of them at all times. Angels might comply but not mere mortals. It follows that every breach of the section cannot be considered to infringe upon the values that are essential to the make-up of a good teacher. However, the section does indicate that teachers are very properly expected to maintain a higher standard of conduct than other employees because they occupy such an extremely important position in society.

...

It follows that an employer will only be justified in disciplining a teacher in cases of a significant breach of the section.¹¹⁷

Because teachers are in a position of trust and teach by example, their conduct both outside and inside the classroom may constitute a breach of their duty.¹¹⁸

It is obvious that a teacher who engages in sexual misconduct with a student breaches this duty. Indeed, many arbitrators have characterized a teacher's sexual misconduct as a breach of section 264(1)(c) and therefore, as "just cause" for termination of employment.

Three comments need to be made about section 264(1)(c). First, I agree that its language is that of another era. Indeed, some have questioned whether the mandate to inculcate "Judeao-Christian morality" even survives

¹¹⁶ (1997), 144 D.L.R. (4th) 385 (S.C.C.) [hereinafter, *Bhadauria*].

¹¹⁷ *Ibid.* at 401-402.

¹¹⁸ *Ibid.* at 402-403.

the *Canadian Charter of Rights and Freedoms*.¹¹⁹ Second, and more to the point, the section, standing alone, provides little or no insight in determining what constitutes misconduct, including sexual misconduct. While it does provide the rationale for why out-of-classroom and even off-duty conduct may nonetheless constitute a breach of a teacher's duty, it provides little practical assistance in determining whether conduct constitutes a breach, or how significant the breach might be. No doubt, some conduct, such as the commission of a sexual offence against a student, is patently a violation of a teacher's duty, and just cause for termination. However, other conduct may be less obviously a breach of duty, and may raise issues that call for a clearer statement of the duty. Third, the characterization of exploitative, discriminatory, traumatizing and sometimes criminal behaviour merely as a failure to set a positive moral example for students may detract from its seriousness.

Where teachers breach the *Education Act*, they may be disciplined by their school board employers. This discipline may involve a reprimand, suspension, demotion or termination of employment. Apart from these employment consequences, the same teachers may be disciplined by the Ontario College of Teachers. A regulation under the *Ontario College of Teachers Act*, 1996¹²⁰ makes it clear that professional misconduct includes a failure to comply with the *Education Act* or its regulations. Because the College's disciplinary role will be discussed later, only brief reference to it is made here. Suffice it to say that the College can, amongst other things, suspend or revoke a teacher's certificate of registration and qualifications (a "teacher's certificate").¹²¹ Since the *Education Act*¹²² provides that, subject to limited exceptions, no person shall be employed in an elementary or secondary school to teach or perform any duty for which membership in the

¹¹⁹ See, for example, Elizabeth J. Shilton (1997) *Education Labour and Employment Law in Ontario* (Toronto: Canada Law Book), p. 8.3.

¹²⁰ O.Reg. 437/97, "Professional Misconduct".

¹²¹ Prior to the establishment of the Ontario College of Teachers, the Minister of Education alone had the power to cancel or suspend a teacher's certificate. In doing so, the Minister considered the recommendations made by the Relations and Discipline Committee of the Ontario Teachers' Federation acting pursuant to the *Teaching Profession Act*. The College now acts independently of the Minister.

¹²² Section 277.3.

Ontario College of Teachers is required under this Act unless the person is a member of the College, suspension or revocation of a teacher's certificate effectively ends the employment of a teacher, principal or supervisory officer.

Returning to the disciplinary process between employer and teacher, it must be noted that all teachers¹²³ are members of a bargaining unit designated under the *Education Act*. Their employment status is therefore governed by a combination of collective agreement provisions and statutory provisions.¹²⁴ Collective bargaining between teachers and their employers occurs at the school board level and the provisions of the collective agreements will therefore vary from board to board. However, these agreements typically contain a "just cause" provision, limiting a school board's power to discipline teachers to cases in which the school board has "just cause" to do so.¹²⁵ The collective agreement will also require that any disagreements arising from the interpretation or application of the agreement, including disagreements regarding a school board's disciplinary action, must be resolved through arbitration. Grievances under the collective agreement are thus the subject of arbitration proceedings, now conducted pursuant to the *Labour Relations Act*, 1995.¹²⁶

As indicated, a significant breach of the duty imposed by section 264(1)(c) may constitute just cause for discipline. Resort need not always be

¹²³ Principals and supervisory officers are not members of a bargaining unit, and are not governed by a collective agreement.

¹²⁴ Teachers in Ontario were traditionally employed under a statutory form of contract, which contained provisions regarding, among other things, notice of termination and pay schedules. However, the requirement that teachers be employed under such a contract was repealed by Bill 160.

¹²⁵ Alternatively, section 263 of the *Education Act* provides that despite any provision in a collective agreement, a school board may, with the consent of the Minister of Education, terminate the employment of a teacher on 30 days notice or upon payment of one-tenth of the teacher's salary, if the "teacher is employed by a board and a matter arises that in the opinion of the Minister adversely affects the welfare of the school in which the teacher is employed". In exercising his or her authority under this section, the Minister of Education owes a duty of fairness to the teacher whose employment is at stake: *Re Campbell and Stephenson et al.* (1984), 44 O.R. (2d) 656 (Div. Ct.).

¹²⁶ Section 277.2(1) of the *Education Act*. An alternative mechanism involving a hearing before a Board of Reference was repealed by Bill 160.

had to section 264(1)(c) to justify discipline for just cause. Conduct amounting to "professional misconduct" within the meaning of the *Ontario College of Teachers Act, 1996* may also provide a basis for a finding of just cause, as might conduct that violates a school board's written policies on sexual misconduct.¹²⁷

Defining and Evaluating Just Cause For Discipline

The arbitration board that considers whether an employee has been justifiably disciplined needs to determine three things:¹²⁸

1. **Whether the employee is actually responsible for the conduct alleged**

One issue that frequently arises in this context is the use that can be made of a finding of guilt in related criminal proceedings. My recommendations address later, in some detail, the use that should generally be made of prior criminal proceedings. In my view, this much is clear. In cases where a teacher has been found guilty of a criminal offence, the arbitration board should treat the findings as *prima facie* evidence that the teacher engaged in the conduct that gave rise to the finding of guilt.

Where the alleged conduct has not been the subject of criminal proceedings or where such proceedings did not result in a finding of guilt, the school board needs to establish on a balance of probabilities that the conduct relied upon to justify discipline was engaged in. Where sexual misconduct is alleged, the jurisprudence requires "clear and cogent" evidence. Nonetheless, given the differences in the burden of proof between criminal and disciplinary proceedings, an acquittal in the criminal proceedings certainly does not

¹²⁷ Traditionally, arbitrators have, not surprisingly, referred to section 264(1)(c) in assessing just cause since the duties reflected in the *Teaching Profession Act* and the *Ontario College of Teachers Act, 1996* add little to the analysis. My recommendations, if adopted, would provide for more helpful articulation of a teacher's duties by the College pursuant to the *Ontario College of Teachers Act, 1996*. Of course, resort to the latter as well as section 264(1)(c) of the *Education Act* are not mutually inconsistent. Surely, conduct which amounts to professional misconduct would also amount to a failure to set a positive moral example for students.

¹²⁸ Bhadauria, *supra* at 401.

preclude disciplinary proceedings based upon the same alleged conduct. As well, sexual conduct that is not a crime may still afford a sound basis for disciplinary proceedings. An acquittal might simply reflect that the conduct, however inappropriate, did not amount to a crime. (These comments are equally applicable to disciplinary proceedings before the Discipline Committee of the Ontario College of Teachers.)

2. Whether the conduct provides just cause for discipline

As indicated, sexual misconduct undoubtedly provides just cause for discipline. The challenge is to better articulate what constitutes sexual misconduct. Similarly, conduct that is not sexual misconduct *per se* but is proscribed by school board policy because it may lead to sexual impropriety, or the appearance of it, may provide just cause for discipline. Again, the challenge is in setting the boundaries between acceptable and unacceptable conduct.

3. Whether the disciplinary measures selected are appropriate, given the misconduct and all other relevant circumstances

In determining whether there is "just cause" for the discipline imposed by a school board, arbitrators must weigh the totality of circumstances, including the nature and seriousness of the conduct and the seniority and past performance of the teacher. However, as noted in *Bhadauria*, "it is essential that arbitrators recognize the sensitivity of the educational setting and ensure that a person who is clearly incapable of adequately fulfilling the duties of a teacher both inside and outside the classroom is not returned to the classroom. Both the vulnerability of students and the need for public confidence in the education system demand such caution."¹²⁹

The inherent vulnerability of children, and the fact that much of a teacher's contact with children is unsupervised by other adults, merits caution. Primary consideration is given to whether the teacher's conduct may cause students to be placed or remain at risk. For this reason, arbitrators tend not to distinguish between cases of sexual misconduct involving a teacher's own

¹²⁹ *Bhadauria, supra*, at 403.

students, and cases involving other students or children.¹³⁰ It is also, in part, for this reason that *progressive discipline*, which plays a prominent role in other workplace-related misconduct, has more limited relevance to sexual misconduct by teachers against students.¹³¹

The Teaching Profession Act

The *Teaching Profession Act*, first enacted in 1944, established the Ontario Teachers' Federation (the "OTF") and its affiliates as the official representatives of teachers in Ontario. The Act defines a teacher as "a person who is a member of the Ontario College of Teachers and is employed by a board as a teacher" but specifically excludes principals, vice-principals and supervisory officers from the definition.¹³² This is in keeping with the exclusion of principals and vice-principals from the collective bargaining process after the passage of Bill 160.¹³³ However, principals and vice-principals remain teachers for the purposes of the *Education Act* and are members of the College.¹³⁴

Teachers employed by a school board in Ontario are members of the OTF, and are assigned membership in one of its four affiliates: the Ontario Secondary School Teachers' Federation, the Elementary Teachers' Federation of Ontario,¹³⁵ the Association des enseignantes et des enseignants

¹³⁰ *Re Ontario Public School Teachers Federation and Perth County Board of Education* (April 19, 1995) (McKechnie) [unreported]; *Re Pierce and Lakehead Board of Education*, (April 29, 1994) (Board of Reference, Kinsman J.) [unreported].

¹³¹ As the board put it, "no male teacher should have to be warned that it is inappropriate to run his hands down a female student's back while enquiring whether she is or ought to be wearing a bra". *Board of Education for the City of North York and Ontario Public School Teachers' Federation, North York District* (Alan Shaw) (1998) ERC 687 (Kennedy), at 85. However, in some less serious cases of sexual harassment, the use of progressive discipline may still be appropriate.

¹³² Section 1.

¹³³ Section 277.1(1).

¹³⁴ Sections 262(1) and 265.

¹³⁵ Formerly the Federation of Women Teachers' Associations of Ontario and the Ontario Public School Teachers' Federation.

franco-ontariens and the Ontario English Catholic Teachers' Association. Affiliate branches are the recognized bargaining agents with school boards.¹³⁶

Until the establishment of the Ontario College of Teachers, the OTF was also primarily responsible for disciplining teachers. The College has now assumed that role, subject only to certain pre-existing cases.¹³⁷ Under the *Teaching Profession Act*, the OTF is authorized to make regulations prescribing a code of ethics for its teacher-members, as well as prescribing the duties, responsibilities and privileges of its teacher-members.¹³⁸ The regulation enacted by the OTF¹³⁹ established the general duties owed by a teacher, as well as specific duties owed by a teacher to particular parties. These sections of the regulation are sometimes referred to as a "code of conduct".

Section 13 of the regulation states that a teacher's *general duty* is to "strive at all times to achieve and maintain the highest degree of professional competence and to uphold the honour, dignity and ethical standards of the teaching profession".

Sections 14(d) and (f) provide that a teacher owes a duty to his or her pupils to show consistent justice and consideration in all relations with pupils; and to concern him or herself with the welfare of his pupils while they are under the teacher's care.

Section 16(b) provides that a teacher owes a duty to the public to recognize a responsibility to promote respect for human rights.

Again, while sexual misconduct has been characterized in disciplinary proceedings as constituting breaches of sections 13, 14(d) and (f) of the regulation, these stated duties, though commendable, are again so general as

¹³⁶ Section 277.3(2).

¹³⁷ All disciplinary cases commenced on or after January 1, 1997, are handled by the Ontario College of Teachers: O.Reg. 276/97.

¹³⁸ Section 12 of the *Teaching Profession Act*.

¹³⁹ Referred to as the "Regulation Under the *Teaching Profession Act*".

to provide little insight into what constitutes sexual misconduct. They provide little assistance in distinguishing unacceptable and acceptable conduct.

The Ontario College of Teachers Act, 1996

The *Ontario College of Teachers Act*, 1996 established the teaching profession in Ontario as a self-regulating profession. The Ontario College of Teachers has statutory responsibilities that include the accreditation of teachers and, most relevant here, the investigation and prosecution of complaints of professional misconduct. The Discipline Committee constituted under the Act hears cases of alleged professional misconduct.

Subject to limited exceptions, teachers, principals (including vice-principals) and supervisory officers are all required to hold certificates of qualification from the College, and are therefore subject to the College's disciplinary powers.

Section 41(1)22 of the Act empowers the College to make by-laws prescribing professional and ethical standards applicable to members.

The College has undertaken, through a bylaw, to create a Code of Ethics to ensure the dignity and integrity of its members, and to define their obligations and professional duties. The bylaw states that "it shall be the duty of every member of the College to adhere strictly not only to the letter of the Code of Ethics but also to the underlying spirit and precepts thereof." A Code of Ethics has not yet been fully developed. I strongly support its creation, and my recommendations suggest some elements of such a code.

Section 40(1)31 authorizes the College, subject to the approval of cabinet and prior review by the Minister, to make regulations "defining professional misconduct for the purposes of this Act". Pursuant to that authorization, Ontario Regulation 497/97 defines "professional misconduct". Section 1(7) of this regulation provides that professional misconduct includes:

7. Abusing a student physically, sexually, verbally, psychologically or emotionally.

The following headings of professional misconduct identified in the regulation also have relevance:

15. Failing to comply with the *Education Act* or the regulations made under that Act, if the member is subject to that Act.
 16. Contravening a law if the contravention is relevant to the member's suitability to hold a certificate of qualification and registration.
 17. Contravening a law if the contravention has caused or may cause a student who is under the member's professional supervision to be put at or to remain at risk.
 18. An act or omission that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.
 19. Conduct unbecoming a member.
- ...
27. Failing to comply with the member's duties under the *Child and Family Services Act*.

In addition, section 2 of the regulation states that the College will treat a finding of professional misconduct or similar finding against a member by a governing authority of the teaching profession in a jurisdiction other than Ontario as professional misconduct here, if based on facts that would constitute professional misconduct in Ontario.

Section 1(7) of the regulation under the *Ontario College of Teachers Act*, 1996 represents the only specific reference in the three education-related statutes to sexual impropriety. It identifies "sexual abuse" as professional misconduct. Sexual abuse is not defined.

As I have noted elsewhere, the term "sexual abuse" is understood by many to describe conduct that involves physical contact between abuser and victim that is criminal, and that involves a significant age differential between the parties. It is not always understood to include activity that does not involve physical contact (such as indecent exposure) or which is non-criminal

(such as a teacher's comments about the size of a student's breasts). Further, I noted that, while "sexual abuse" appropriately describes a sexual assault, the term may not be suitable to describe offensive conduct of a sexual nature which nonetheless should be proscribed. Put simply, the term is under-inclusive and fails to capture the full range of sexual misconduct which may properly be the subject of disciplinary proceedings by an educator's employer or by the College. Its use may leave the erroneous message that only those forms of sexual misconduct which can be characterized as abuse should be regarded as professional misconduct.

I appreciate that sexual misconduct that falls short of sexual abuse may be characterized as conduct unbecoming a member, or as disgraceful, dishonourable or unprofessional, or as a contravention of a law relevant to the member's suitability to practice or which might cause a student to be put or to remain at risk. These are other categories of professional misconduct contained in section 1 of the regulation. However, misconduct of a *sexual nature* should be described as such. More to the point, the regulation should serve to inform and educate members. This means that not only should the term "sexual misconduct" be utilized, but that it should be defined.

In summary, the *Education Act*, the *Teaching Profession Act* and the *Ontario College of Teachers Act*, 1996, or regulations thereunder, all establish standards of conduct for school teachers, violation of which may result in disciplinary proceedings affecting employment or professional status. Though sexual misconduct would clearly constitute "just cause" for discipline as well as professional misconduct, the standards, as presently stated, provide little or no insight as to what sexual misconduct is. Only the regulation to the *Ontario College of Teachers Act*, 1996 specifically addresses the issue. The term "sexual abuse" is ill-suited to embrace the full range of sexual activity that should constitute professional misconduct. Though such conduct might be captured by the other heads of professional misconduct in the regulation under the *Ontario College of Teachers Act*, 1996, once again, these heads of misconduct provide little guidance as to what sexual misconduct is.

Recommendations 6 to 8: Defining and sanctioning sexual misconduct

6.1 Section 1 of the misconduct regulation under the *Ontario College of Teachers Act*, 1996 should be amended to provide that professional misconduct includes "sexual misconduct".

6.2 "Sexual misconduct" should be defined as "offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment".

7.1 The Ontario College of Teacher's Code of Ethics should further elaborate upon the meaning and content of "sexual misconduct".

7.2 The Code of Ethics should provide that:

(a) its members not engage in offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment ("sexual misconduct").

(b) "Sexual misconduct" includes, but is not limited to:

Sexual abuse

(i) conduct which would amount to sexual interference, an invitation to sexual touching, sexual exploitation, sexual exploitation of a person with a disability, an indecent act or exposure, or a sexual assault or other crime which may affect the personal integrity or security of any student or the school environment;

Sexual harassment

(ii) objectionable comments or conduct of a sexual nature that may affect a student's personal integrity or security or the school environment. These may not be overtly sexual but nonetheless demean or cause personal embarrassment to a student, based upon a student's gender;

Sexual relationships

- (iii) any sexual relationship with a student or a former student under the age of 18 and any conduct directed to establishing such a relationship.

8. The “Regulation Under the *Teaching Profession Act*” should be amended to specifically provide that a teacher owes a duty to his or her pupils to respect their sexual integrity and personal security.

Some commentary on these recommendations is required.

1. The crimes described in paragraph 7.2(b)(i) are the sexual offences analyzed in detail earlier in this chapter. Earlier, I also listed other criminal offences that may precede, or be incidental to, sexual misconduct and which, in the particular circumstances of each case, may tend to affect the personal integrity or security of students or the school environment. These are contemplated by paragraph 7.2(b)(i) as well. These crimes may involve a member’s own students, other students or children, or even adults, if the fact that the member has engaged in such conduct may tend to affect the personal integrity or security of students or the school environment. Finally, the member need not have been found guilty of the crime, where the conduct is otherwise proven before the Discipline Committee.
2. Conduct which would amount to sexual harassment or sexual discrimination under the *Ontario Human Rights Code* constitutes professional misconduct under paragraph 7.2(b)(ii). However, as I reflected earlier, the *Code* does not articulate exhaustively the sexual boundaries for teachers in their relationships with students. In this respect, there is a distinction between the workplace and the school. Though the power imbalance between employers/supervisors and their employees requires care to ensure that a position of authority is not misused, the law does not prohibit social or sexual relationships between employers/supervisors and their adult employees. This is why conduct must be “unwelcome” to constitute sexual harassment or discrimination in the workplace. Indeed, “harassment” or “discrimination” may involve conduct that is intrinsically unwelcome to another person (whether or not the person who finds the conduct vexatious is the person to whom the conduct was directed.)

However, it must be remembered that sexual relationships and certain social relationships between teachers and students are inappropriate, regardless of whether the affected students regard them as “unwelcome”. For example, no teacher should make sexual advances to a young student. Clearly, highly sexualized comments by teachers (even if purportedly welcomed by students present) constitute offensive conduct of a sexual nature which tend to affect the personal integrity or security of students or the school environment. The *Ontario Human Rights Code* only represents an important *starting point* for defining the appropriate boundaries of teacher-student relationships.

Similarly, conduct need not be *ongoing* to constitute sexual misconduct within the meaning of paragraph 7.2(b)(ii). Of course, the nature and extent of the conduct will figure prominently in whether the College will treat it as a disciplinary matter and, if so treated, what sanctions should be imposed.

3. Paragraph 7.2(b)(iii) prohibits sexual relationships with *students*. Though such relationships with students under 18 almost inevitably constitute the crime of sexual exploitation, this paragraph is intended to explicitly prohibit any sexual relationship with a student and do so regardless of age. For the purposes of this paragraph, it is not necessary that the student be in the teacher’s own classroom. Paragraph 7.2(b)(iii) also addresses conduct which is directed to establishing a sexual relationship. Intimate letters, telephone calls or suggestive comments may constitute such conduct.

4. Paragraph 7.2(b)(iii) also addresses sexual relationships with former students. Some interested parties suggested that sexual relationships with all *former* students within a fixed period after the teacher-student relationship has ended should be prohibited. Indeed, some existing school board policies and protocols specifically address this issue. For example, the Toronto District School Board policy prohibits staff and volunteers from entering into a sexual relationship with a student during the course of the professional relationship *or for a period of one year thereafter*.

The *Education Act*¹⁴⁰ generally provides that children must attend school until the end of the school year in which the child attains the age of 16.

¹⁴⁰ Section 21(1)(b).

Sometimes, teachers commence sexual activity with children under the age of 18 once they leave school. In my view, teachers do so to the potential detriment of their former and current students. The power differential between teacher and former student, the fact that the evolution of their relationship commenced in the teacher-student context and, of course, the teacher's status as the child's former teacher all raise concerns about the young person's vulnerability and weakness and the continuing existence of a power imbalance. Equally important, sexual activity with a former student raises issues of concern in the teacher's continuing school environment. Are the teacher's classes perceived as an opportunity to cultivate students for future sexual relationships? Can students feel secure and protected in this environment? Is a teacher's relationship with a former student reconcilable with the need for public confidence in that teacher and in the educational system? A student who leaves school may later choose to resume studies at the school where the teacher works, or at another school. Paragraph 7.2(b)(iii) addresses this issue.

Sometimes, teachers commence sexual activity with former secondary school students who have already attained the age of 18. Some of the same concerns obtain here as well. However, the ability to regulate the conduct of teachers respecting former students now over the age of 18 is uncertain.

To the extent that conduct occurs *during* the teacher-student relationship which is directed to establishing a sexual relationship, it would be prohibited under paragraph 7.2(b)(iii). To the extent that teachers seek to establish sexual relationships with former students under the age of 18, such conduct would be prohibited under paragraph 7.2(b)(iv). I am not convinced that the College's Code of Ethics, which imposes uniform duties upon its members across Ontario, should otherwise prohibit sexual relationships between teachers and former students. Such a blanket prohibition poses no end of difficulties, as well, in the context of university and college students, mature students and adult education students. So as not to be misunderstood, I need to reiterate that any conduct by a teacher during the teacher-student relationship, regardless of the respective ages of the parties, which establishes or is directed to establishing a sexual relationship should be strictly prohibited.

Finally, I note that school boards are entitled, through their individual policies and protocols, to impose additional duties, or higher standards, upon teachers than those set by legislature or the College's Code of Ethics. These duties should, of course, be reasonable and in compliance with legal or constitutional imperatives.

Recommendation 9: Commentary to Code of Ethics

9.1 Commentary to the Code of Ethics should explain and provide illustrations (as has been done throughout Chapter IV of this Report) of the criminal and non-criminal manifestations of sexual misconduct.

9.2 The commentary should also dispel misconceptions about sexual misconduct which are commonly held or advanced in response to allegations of misconduct.

In some notorious cases, teachers have defended against allegations of sexual misconduct in both criminal and disciplinary proceedings by claiming that they misconceived or were never taught the appropriate boundaries of teacher-student relationships. Some of these protestations are patently suspect and inconsistent with the nature and seriousness of the conduct proven. However, there is great value in specifically addressing the most commonly advanced "misconceptions". For example, allegations of sexual harassment or offensive sexual comments directed to students are frequently met with "I was only joking" or "I thought it was alright because nobody protested". These "defences" misapprehend what constitutes sexual harassment. Similarly, allegations of physical contact with students have been met with "I had no sexual intent so I did nothing wrong." Again, this misconceives the elements of a sexual assault.

The Relationship between Legislated Code of Conduct and School Board Policies and Protocols

Chapter VI examines the individual board policies and protocols that presently exist and makes recommendations for change. Some of these policies (where they do exist) address standards of conduct for teachers and others who supervise students. Some do not. Having recommended that sexual misconduct be specifically referred to as a head of professional misconduct and, further, that it be elaborated upon in the College's Code of Ethics applicable to the College's members across Ontario, I must consider whether there is also a need for codes of conduct to be contained in the policies and protocols of each school board.

In my view, there are important reasons why each board needs to adopt a code of conduct with elements that are largely uniform across the province but which could accommodate local differences.

First, the College's Code of Ethics adopted pursuant to the legislative authority contained in the *Ontario College of Teachers Act*, 1996 cannot extend to school volunteers and employees who need not be members of the College. Board policies can and should extend to such persons.

Second, a code of conduct is more likely to be disseminated and made known to all interested parties, including the community, if expressly incorporated into the policies and protocols of each school board.

Third, individual school boards are entitled, as a matter of policy, to discourage or prohibit activities which may not constitute sexual misconduct *per se* but which nonetheless raise appropriate boundary issues: for example, to what extent should teachers be giving young students rides home or attending at their homes? The answers to some boundary questions may depend upon local circumstances and, in any event, may not be the subject of consensus across the province. (This topic is more fully addressed below.)

It follows that each school board should have policies that incorporate the minimum standards of conduct that apply across Ontario, but may yet impose higher standards of conduct.

Defining the appropriate boundaries for teachers' conduct (other than sexual misconduct) has its difficulties. It is important not to proscribe normal, indeed desirable, social interaction between school staff and students. Teachers frequently report that they now feel inhibited about perfectly innocent conduct which may enhance a nurturing environment and provide emotional support to a troubled child. Indeed, some refrain from otherwise innocent conduct for fear that they may leave themselves open to allegations of sexual abuse. Some of these inhibitions are an unavoidable byproduct of a heightened and fitting sensitivity to sexual abuse. Of course, the goal is to establish codes of conduct that minimally inhibit ordinary social contact between teachers and students, yet provide a level of comfort to both that the boundaries are understood. Codes must also contain some flexibility to recognize that different circumstances may require different approaches.

Behaviour That is Not Misconduct Per Se

Apart from standards or codes of conduct that establish what sexual misconduct is, a number of interested parties have indeed urged that board

policies should be established to address related conduct. For example, the following suggestions were made:

Board Policies should be established to deal with the following: gift-giving, writing of notes of a personal nature, not staying over at teachers' residences, coaches relating to students in schools, locker room activity, behaviour on tournaments, driving students home from games or practices. Board policies should also be made for other disciplines where teachers have interaction with students outside the regular school day, such as drama and music.

Board policies outlining the obligations of teachers regarding off-duty conduct, relating to other venues that involve students or young people, e.g. plays, concerts, sports teams, choirs, boy scouts, socializing at bars, should be implemented to aid in protecting students.¹⁴¹

Some of these activities, such as writing notes of a personal nature, may well manifest sexual harassment or a sexual relationship between teacher and student and, as a result, would already be encompassed in the definition of sexual misconduct to be contained in the College's future Code of Ethics. Some of these activities, such as students staying over at teachers' residences, driving students home from games or practices, may or may not be incidental to sexual misconduct or represent a prelude to sexual misconduct. These activities may not be characterized in themselves as sexual misconduct, but could be conduct leading to establishing a sexual relationship, and may therefore be subject to some regulation to avoid sexual impropriety or the appearance of it. Again, the challenge is to create policies that do not inhibit normal social interaction between teachers and students, but enhance a nurturing environment while protecting students.

In my view, it would be unwise to create a province-wide policy that defines, for example, when a teacher can or cannot drive a student home from school. I can contemplate situations, depending upon the locale, personal circumstances or exigencies, where some activities are entirely appropriate, and others where the same activities justifiably raise serious concerns. Similarly, students should generally not be staying over at teachers'

¹⁴¹ Submission of the Ontario Teachers Federation ("OTF").

residences. However, there are circumstances where this could appropriately occur: for example, where the student is a classmate of the teacher's own child.

These concerns are best addressed in two ways: by establishing, in more general terms, province-wide standards through the College, and by encouraging school boards to establish specific rules that reflect local concerns or circumstances.

Recommendation 10: Proscribing other conduct

10.1 The Ontario College of Teachers Code of Ethics should state, in general terms, a member's duty not only to avoid sexual misconduct but also to avoid activities which may reasonably raise concerns as to their propriety.

Such a rule might include the following:

The member should avoid activities that, standing alone, may not constitute sexual misconduct but would raise concerns in the minds of a reasonable observer as to their propriety. Members should be mindful of these and other considerations, in evaluating the propriety of such activities:

- (a) whether the activities are known to, or approved by, supervisors and/or parents or legal guardians;
- (b) whether the student is isolated;
- (c) whether urgent or exigent circumstances obtain;
- (d) whether the school environment might be detrimentally affected by the activities; and
- (e) to what extent may the activities be reasonably regarded as posing a risk to the personal integrity or security of a student, or as contributing to any student's level of discomfort.

Commentary to such a rule should provide concrete examples of the kinds of conduct that should generally be avoided, or which should only occur where certain conditions exist.

10.2 Each school board should, where desirable, refine these more general rules through their own policies and protocols to address issues of particular concern in their community.

For example, a school board may determine that, as a matter of policy, no students should ever sleep over at the home of a school employee, who is not the parent of a student at the school, except with the permission of a supervisor and a parent or legal guardian. Further suggested policies and protocols are addressed in Chapter VI.

Reprisals

If sexual misconduct is to be effectively identified and addressed, students (and others within the school system) must feel secure in coming forward with complaints or other information about alleged sexual misconduct. In order to foster such a safe and supportive environment, the Code of Ethics should make it clear no members of the College shall engage in, or threaten to engage in, reprisals against any person who discloses or reports alleged sexual misconduct.¹⁴²

Recommendation 11: Anti-reprisal provision in Code of Ethics

11. The Ontario College of Teachers Code of Ethics should specifically state that no member shall engage in, or threaten to engage in, reprisals against anyone who discloses, reports, or otherwise provides information with respect to alleged sexual misconduct.

This provision would apply not only to the member of the College who is alleged to have engaged in sexual misconduct, but to any other teacher, principal or supervisory officer who interferes with the disclosure or

¹⁴² Engaging in such reprisals could fall within any number of sections of the misconduct regulation under the *Ontario College of Teachers Act*, 1996, including section 19 (conduct unbecoming a member), section 18 (disgraceful, dishonourable or unprofessional conduct) or section 5 (failing to maintain the standards of the profession).

investigation of sexual misconduct. The positive duties of these parties in cases of suspected sexual misconduct are outlined below.

ii) The Duties and Obligations of School Boards, Fellow Educators, Principals and Supervisory Officers

This section of the Report is concerned with the obligations of school boards, teachers, principals and supervisory officers to address known or suspected sexual misconduct by other school employees or volunteers.

Teachers

The statutory duty to report known or suspected sexual abuse to a children's aid society is found in section 72 of the *Child and Family Services Act*. Its scope and meaning have already been elaborated upon. A teacher's failure to comply with his or her duties under the *CDSA* constitutes professional misconduct before the Ontario College of Teachers.¹⁴³ Members of the College include principals, vice-principals and supervisory officers, all of whom are teachers.¹⁴⁴

A failure to comply with the *CDSA* might also form the basis for disciplinary action by the employer. In my view, any school employee (and not just teachers) could be disciplined by the school board for a failure to comply with his or her duty under the *CDSA*.

As I indicated earlier, in light of the reporting provision of the *CDSA*, it may be appropriate to draw a distinction between sexual abuse (which must be reported to a children's aid society) and other forms of sexual misconduct (which are not reportable under the *CDSA*). However, to be clear, a teacher's duty towards his or her students, whether under the *Education Act*, the *Teaching Profession Act* or the *Ontario College of Teachers Act*, 1996 requires him or her to intervene to protect a student from being the victim of sexual misconduct in the school environment even when that misconduct does not constitute reportable abuse under the *CDSA*. This duty may entail, in part, the reporting of such misconduct to the principal or supervisory officer.

¹⁴³ O.Reg. 497/97, s. 1(27).

¹⁴⁴ As previously noted, business supervisory officers represent an exception.

Where sexual abuse of an older student is alleged, this duty may also entail the reporting of such abuse to the police.

A significant issue that arose during this review was the interaction between a teacher's duty to report known or suspected sexual misconduct and a teacher's duty to a fellow teacher under section 18(1)(b) of the Regulation under the *Teaching Profession Act*.¹⁴⁵ It was most often raised with respect to the effect of section 18(1)(b) upon the teacher's reporting duty under the CFSAs.

Under section 18(1)(b), a teacher has a duty to other teachers "on making an adverse report on another member, [to] furnish him with a written statement of the report at the earliest possible time and not later than three days after making the report".

Although the regulation does not define "adverse report", the OTF's Relations and Discipline Committee has defined it as a report that "could have a negative impact on a teacher's employment". The Committee has found that providing a report on another teacher to the police is an adverse report. Therefore it might appear, on the face of it, that reporting a colleague's suspected sexual misconduct, whether to school board officials, the police, or a children's aid society, would fall within the scope of this section.

However, virtually all interested parties agree that the adverse report provision does not or should not apply to reports of suspected sexual misconduct. Nevertheless, there is evidence that some teachers believe that the "adverse report" provision does apply to cases of suspected sexual misconduct, and, as a result, are hesitant to report their suspicions.

The DeLuca case is again illustrative. The principal of Canadian Martyrs indicated that he did not inform the principal of DeLuca's next school of the complaints against DeLuca, in part, because he would have been obligated, under section 18(1)(b), to inform DeLuca that he had done so. In addition, a police officer who investigated the DeLuca case indicated that many of the teachers expressed considerable anxiety over reporting a fellow

¹⁴⁵ This regulation was enacted by the Board of Governors of the OTF under section 12 of the *Teaching Profession Act*, which authorizes it, subject to the approval of the Lieutenant Governor in Council, to make regulations prescribing the duties, responsibilities and privileges of OTF members.

teacher, and that this anxiety was based, at least partially, on their perceived duty to advise DeLuca under section 18(1)(b).

It is clear to me that section 18(1)(b) continues to inhibit some teachers from reporting their suspicions of sexual misconduct. These inhibitions are not confined to the DeLuca case. As well, a mandated disclosure in writing to the suspected teacher within three days could adversely affect the investigation or the emotional well-being of the complainant.

Recommendation 12: Section 18(1)(b) of the "Regulation under the *Teaching Profession Act*"

12. Section 18(1)(b) should be amended to clarify that the duty to inform a colleague about an "adverse report" does not apply to a report of suspected sexual misconduct.

The Manitoba Teachers' Society's *Code of Professional Conduct* already contains a similar exception in its "adverse report" provision:

A teacher directs any criticism of the professional activity of a colleague to that colleague and only then, after informing the colleague of the intent to do so, may direct in confidence the criticism to appropriate officials. *It shall not be considered a breach of this clause to report reasonable grounds for suspecting child abuse to proper authorities according to legal requirements.*¹⁴⁶

For the reasons earlier advanced, I suggest that section 18(1)(b) should have no application to suspected sexual *misconduct*, not merely sexual *abuse*. Whether a teacher must report to a children's aid society, the police or to a principal, reporting of sexual misconduct should not be inhibited through misplaced resort to section 18(1)(b).

Finally, though not within my mandate, it is obvious that non-sexual child abuse should be similarly addressed. Indeed, some parties question whether section 18(1)(b) serves any real purpose. Others contend that it continues to have validity where a teacher has criticism for a colleague's

¹⁴⁶ Manitoba Teachers' Society, 1993, Section 7.

teaching skills or performance. It is unnecessary for me to address that broader question here.

Principals and Supervisory Officers

The duties of principals and supervisory officers, in addition to those they assume as teachers, are set out in the *Education Act* and in its regulations. For example, the principal of a school is said to be in charge of "the instruction and the discipline of pupils in the school" as well as "the organization and management of the school". The principal must give "assiduous attention to the health and comfort of the pupils" and must furnish to the Ministry and to the appropriate supervisory officer any information that it may be in the principal's power to give respecting matters affecting the interests of the school, and must prepare such reports for the school board as are required by the board.¹⁴⁷ Supervisory officers, such as school superintendents and directors of education, are required to ensure that the schools under their jurisdiction are conducted in accordance with the *Education Act* and its regulations.¹⁴⁸

It is unnecessary to further delineate the duties of principals and supervisory officers. Suffice it to say, they assume supervisory and managerial responsibilities beyond those held by teachers. How these responsibilities are best discharged is better addressed in Chapter VI, where recommended policies and protocols for school boards, principals, supervisory officers and teachers are outlined. Those suggested policies and protocols draw upon, and remain consistent with the duties established under the *Education Act*.

A principal or supervisory officer who fails to fulfill his or her duties under the *Education Act* may be disciplined by his or her employer school

¹⁴⁷ Section 265 of the *Education Act*, R.R.O. 1990, Reg. 298, s. 11.

¹⁴⁸ Section 286 of the *Education Act*.

board or by the College.¹⁴⁹ Having said that, the focus here is on creating policies and protocols that can be implemented and followed by both.

In this chapter, and in Chapter VI, I outline the duties that teachers, principals and supervisory officers have to intervene in cases of suspected or alleged sexual misconduct within their schools. A failure to fulfill these duties would constitute professional misconduct.

In a case pending before the College's Discipline Committee, a principal is facing disciplinary action for allegedly failing to respond to complaints about an elementary school student's aggressive and sexually explicit behaviour. It is alleged that the principal "failed to recognize that [the student] may be the victim of abuse" and "permitted an unsafe environment to continue" within the school.¹⁵⁰ These are only allegations, and the merits of the case have not been determined.

The professional duty of teachers, including principals and supervisory officers, to protect their students by intervening in cases of suspected sexual misconduct, should be specifically addressed in the Ontario College of Teacher's Code of Ethics.

¹⁴⁹ Bill 160 repealed the membership of principals in the OTF and amended the *Labour Relations Act*, 1995 and Part X.1 of the *Education Act*, to exclude principals from bargaining units. Their employment is therefore not governed by a collective agreement. Section 287.1(2) of the *Education Act*, enacted by Bill 160, states that the Lieutenant Governor in Council may make regulations governing the terms and conditions of employment for principals and vice-principals. However, no such regulations have been enacted to date. Therefore, the authority of school boards to discipline principals flows from their authority under sections 170(1)12 and 171(1)3 of the Act to appoint and remove employees in conjunction with the common law.

Section 287 of the *Education Act* states that a school board may, in accordance with the regulations, suspend or dismiss a supervisory officer for neglect of duty, misconduct or inefficiency: see also O.Reg. 309, s. 8(1).

¹⁵⁰ N. Southworth, "School principal's actions under fire" *Globe and Mail* (February 22, 2000).

Recommendation 13: Code of Ethics — Obligation to intervene in cases of suspected sexual misconduct

13. The Ontario College of Teacher's Code of Ethics should provide that all members of the College have a duty to protect students by intervening in cases of suspected or alleged sexual misconduct in accordance with the specific obligations articulated in this Report.

School Boards

The duties of a school board are set out in section 170 of the *Education Act*. Its primary duty is to ensure that every school under its charge is operated in accordance with the *Education Act* and its regulations. As stated by Brown and Zuker, "the responsibility for pupil safety falls squarely at the door of the school board and its staff".¹⁵¹ School boards are also responsible for hiring, dismissing, evaluating, and supervising the teachers, principals, supervisory officers, and other staff under their employ.¹⁵² Again, I have recommended certain policies and protocols, mindful of the statutory duties of school boards and how they should best be fulfilled.

Special consideration needs to be given to the duty imposed upon a school board by sections 47(2) and 47(3) of the *Ontario College of Teachers Act*, 1996. They read:

Disclosure by school board: offences

47(2) A school board shall promptly notify the College in writing when the board becomes aware that a member who is or has been employed by the board,

(a) has been convicted of an offence under the *Criminal Code* (Canada) involving sexual conduct and minors; or

¹⁵¹ A.F.Brown & M.A. Zuker, *Education Law*, 2nd ed. (Toronto: Carswell, 1998) at 57.

¹⁵² Section 170(1)12.

(b) has been convicted of an offence under the *Criminal Code* (Canada) that in the opinion of the board indicates that students may be at risk of harm or injury.

Disclosure by school board: conduct or actions of member

(3) A school board shall promptly notify the College in writing where in the opinion of the board the conduct or actions of a member who is or has been employed by the board should be reviewed by a committee of the College.

These provisions are significantly deficient. Section 47(2) mandates notification to the Ontario College of Teachers ("College") only upon a member's conviction. Where a conviction is not registered, *for whatever reason*, section 47(2) has no application. I was advised by several school boards that they do await the criminal disposition before determining whether to notify the College. A criminal charge is predicated upon the informant's sworn belief, on reasonable grounds, that the accused has committed the offence charged, and the charge, in itself, may therefore indicate that an investigation by the College is warranted. Further, the commission of certain crimes may affect the suitability of the member to practice, or amount to conduct unbecoming a member, even though such conduct does not involve sexual conduct and minors, or a risk of harm or injury to students, as required by section 47(2).

Section 47(3) confers unfettered discretion upon a school board. The evidence presented to me demonstrates that the section is interpreted unevenly and sometimes in a manner inconsistent with the overriding need to protect students. It appears that cases which obviously should have engaged section 47(3) were not reported to the College. In some cases, school boards did not notify the College, *despite themselves dismissing teachers for sexual misconduct*.

More significant, in a number of cases, school boards and teachers' unions negotiate the resolution of sexual misconduct cases. The teacher may agree to resign. The school board may agree to provide a neutral letter of reference or to not disclose the allegations which brought about the teacher's resignation. The benefits to the parties are apparent. School boards are spared the enormous expense and delay associated with the grievance process

and need no longer employ the teacher. On the other hand, the teacher's career may continue elsewhere, unaffected by the allegations of sexual misconduct. Without reflecting in any way upon the parties involved, this process may lead to the "passing of the trash". (I will have more to say about agreed-upon resignations and letters of reference in Chapter VI.)

Counsel for the school boards and teachers' unions with whom I met understood that an agreement by the school board not to notify the College, where notification was required, was contrary to public policy and unlawful. However, the reality is that the unfettered discretion conferred by section 47(3) permits school boards too easily to form the opinion that the teacher's conduct need not be reviewed. This opinion may be coloured by the desirability of resolving these cases quickly and obtaining the teacher's resignation. Indeed, some school boards may generally interpret section 47(3) so as to require no notification where the allegations remain unproven because the suspected teacher resigns.

Recommendations 14 to 15: Obligation of school boards to notify the Ontario College of Teachers

14.1 Section 47 of the *Ontario College of Teachers Act*, 1996 should be amended to more clearly outline the circumstances under which school boards shall notify the Ontario College of Teachers.

14.2 Section 47(2) should be amended to require that a school board promptly notify the College in writing when the board becomes aware that a member who is or has been employed by the board:

has been charged with an offence under the *Criminal Code* (Canada) which, if proven, may amount to offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment.

14.3 Section 47(3) should be retained.

14.4 Section 47 should be further amended to add the following:

(a) Where a school board dismisses, suspends or otherwise disciplines a member of the College in its

employ for engaging in sexual misconduct, it shall promptly notify the College in writing of the disciplinary action, giving reasons.

- (b) If a member of the College resigns during an investigation into allegations that the member engaged in sexual misconduct, a school board shall promptly notify the College in writing of the circumstances surrounding the resignation.¹⁵³

This recommendation bears similarities to existing provisions of the British Columbia *School Act*.¹⁵⁴

15. The *Education Act* should be amended to provide that the duties of principals and supervisory officers include the obligation to promptly report to their school board information relevant to that board's obligation under section 47 of the *Ontario Teachers College Act*, 1996.

I note that there has been at least one case in which a settlement was reached that the teacher resign and that the school board withdraw its complaint regarding the teacher to the College. The College advised the board that it had no power to withdraw the complaint. The complaint proceeded.¹⁵⁵

Section 26(1) of the *Ontario College of Teachers Act*, 1996 provides that the College may receive a complaint from a member of the public, a member of the College, the Registrar, or the Minister of Education. A complaint received from a school board, if proceeded with, is treated as a complaint by the Registrar of the College. Accordingly, the complaint can only be withdrawn by the Registrar. In my view, this is entirely appropriate.

¹⁵³ Section 170(1)12.1 also requires school boards to notify the Minister of Education when one of its teachers is convicted of a sexual offence involving a minor or of any other offence that, in its opinion, indicates that pupils may be at risk. Consideration should be given to whether this section need be amended in similar fashion to section 47.

¹⁵⁴ Section 8 of the *British Columbia School Act* R.S.B.C. 1996, c. 412.

¹⁵⁵ *Ontario College of Teachers v. Caswill* (December 22, 1999) Ontario College of Teachers Discipline Committee (Gelberg). Note: the Discipline Committee found the teacher not guilty of misconduct in this case.

However, a problem arises because of a school board's failure to fall within the scope of the Act's definition of "complainant". The Act requires the College to provide a copy of the written decisions of both the Investigations Committee and the Discipline Committee to the member against whom the complaint was made, and to the complainant.¹⁵⁶ Because school boards are not complainants, the College is not required to share this information regarding the disposition of cases involving teachers under its employ. The College has expressed a concern that, in light of this, it *may not be permitted* to share this information with the school board.

Recommendation 16: **Providing school boards with decisions of the Ontario College of Teachers**

16. **The *Ontario College of Teachers Act*, 1996 should be amended to state that the College is to provide a copy of the decision (and reasons) of the Investigations Committee, the Discipline Committee or the Fitness to Practise Committee to a school board where:**

- (a) **the decision of the committee relates to information provided by the school board under section 47 of the Act; or**
- (b) **the decision of the committee relates to events that occurred while the member who is the subject of the decision was employed by the school board.**

Finally, I note that, pursuant to section 47(1) of the Act, the College may require a school board or other designated persons or bodies to provide the College with information to enable it to carry out its objects, including personal information within the meaning of the municipal or provincial privacy legislation, respecting members of the College. Put simply, there is no impediment preventing a school board from fully informing the College as to the relevant circumstances or background of the suspected teacher.

¹⁵⁶ Section 26(7) re: Investigation Committee. Unless the complaint is referred to a hearing before either the Discipline Committee or the Fitness to Practice Committee, reasons for the decision must also be given. Section 32(13) re: Discipline Committee. Unless the hearing before the Committee was closed, reasons for the decision must also be provided to the complainant. Section 32(13) imposes a similar obligation on the College re: decisions of the Fitness to Practise Committee.

E. Common Law—Civil Liability

Victims of sexual misconduct may bring civil actions against abusers seeking to recover compensation for the harm they suffered as a result of the abuser's tortious or wrongful conduct. Actions of this nature will likely be brought, not only against abusers but, as in the DeLuca case, against others (usually school boards and various of their employees) whose conduct allegedly contributed to the harm. These defendants, generally speaking, owe a duty to students in their schools to provide for their safety and well-being in accordance with the standard of care of a "careful and prudent parent".¹⁵⁷ The plaintiffs' claim will ordinarily be that these additional defendants negligently breached their duty to the plaintiff in that they failed to act in accordance with the standard of care demanded of them in the circumstances of the particular case. If the school board or other defendants are found to be negligent, they would, of course, be liable for damages.

However, even in the absence of negligence, a school board may, in some circumstances, be held vicariously liable for the acts of its employees. If the doctrine of vicarious liability were to be applicable to cases of teacher sexual abuse, a school board would be liable even in the absence of fault or neglect on its part. The doctrine has recently been expanded by the Supreme Court of Canada so as to hold a child care facility strictly liable for the intentional wrongful conduct of an employee. In *Bazley v. Curry*¹⁵⁸ a non-negligent, non-profit organization which operated residential care facilities for the treatment of emotionally troubled children was held vicariously liable for a staff member's sexual abuse of children under his care. The degree to which this doctrine will be extended to other factual situations or, more particularly, to school boards in the types of situations with which this review is concerned, remains to be seen.

It is beyond the scope of this review to analyze the reasons of the Supreme Court of Canada in *Bazley v. Curry* (or in the companion case of *Jacobi v. Griffiths*¹⁵⁹) pertaining to this new development in vicarious liability

¹⁵⁷ *Myers v. Peel County (Board of Education)* (1981), 123 D.L.R. (3d) 1 (S.C.C.).

¹⁵⁸ (1999), 174 D.L.R. (4th) 45 (S.C.C.).

¹⁵⁹ (1999), 174 D.L.R. (4th) 71 (S.C.C.).

and its potential application. Nor is it necessary here to canvass the law of negligence (or fiduciary obligation) as it may apply to teachers and school boards.¹⁶⁰ Nonetheless, it is pertinent to point out that these recent judgments undoubtedly increase the potential for school board liability. The financial consequences that may flow by way of compensatory or punitive damages when reasonable steps are not taken to protect students from teacher sexual misconduct underscore the need for school boards to develop and implement effective policies or protocols to identify and prevent such misconduct in their schools.

F. Special Evidentiary and Procedural Considerations

Introduction

Students who allege they have been the victims of sexual misconduct by their teachers may be called upon to testify about this misconduct or describe it in statements—sometimes videotaped—provided to investigators. Testimony or statements may also be obtained to further a criminal case. Such testimony may also be required in administrative or civil proceedings. This section of the Report primarily focuses upon the procedural and evidentiary considerations that may apply to proceedings before a discipline committee constituted under the *Ontario College of Teachers Act*, 1996 or an arbitrator acting under the *Labour Relations Act*, 1995. It is these proceedings that are most directly related to my mandate, although my comments may have relevance to civil actions or other administrative proceedings involving student testimony.

There is now recognition that providing evidence in a formal setting can be very traumatic for a child. In its 1991 *Report on Child Witnesses*, the Ontario Law Reform Commission described the “imposing atmosphere of the courtroom, repetition of details of an event to strangers in public, cross-examination, face-to-face confrontation, and physical separation from a parent or trusted relative” as some aspects of providing evidence which profoundly

¹⁶⁰ See, generally, Brown & Zuker, *Education Law* (2nd ed.) at 55 *et seq.*

affect child witnesses. The search for the truth may also be thwarted if children and adults are treated in the same way.¹⁶¹

The heightened sensitivity to the difficulties which children face when called upon to testify has been reflected in a number of relatively new evidentiary and procedural rules which apply to various kinds of proceedings involving child witnesses. In the context of criminal prosecutions, the Supreme Court of Canada made these observations:

Parliament, in a series of laws over the past decades moved to sensitize the law to the realities of the child witness. It amended the law to permit children to promise to tell the truth instead of swearing an oath. It removed the requirements for corroboration. Most recently, it has made available to the child witness aids to testifying, like screens, closed courtrooms and counsellors. The Court's decision in *Khan* to permit a child's out-of-court statement to be received where necessity and reliability are present was in keeping with the increasing sensitivity of the justice system to the special problems children may face in giving their evidence and the need to get children's evidence before the court if justice is to be done...¹⁶²

These procedural and evidentiary rules are intended to accommodate the interests of children and the need to discover the truth in ways which remain consistent with the presumption of innocence and the right of an accused to make full answer and defence. They are the product of both judicial and legislative intervention.

This understanding of the special problems which face children as witnesses has also been accompanied by a new appreciation of how children's evidence should be evaluated for accuracy and reliability. Central to this appreciation is the removal of the stereotypical notion that such evidence is inherently unreliable or always less reliable than the evidence of adults and must be treated with special caution. As a result, children's evidence need no

¹⁶¹ Ontario, Law Reform Commission, *Report on Child Witnesses* (Toronto: Law Reform Commission, 1991) at 70-71.

¹⁶² *R. v. F. (W.J.)* (1999), 138 C.C.C. (3d) 1 at 19 (S.C.C.).

longer be corroborated. This permits a child's evidence to be treated with caution where such caution is warranted in the circumstances of a particular case, rather than being automatically discounted. It is also now recognized that the application of adult tests for credibility to the evidence of children may at times be inappropriate. Children have different life experiences than adults and, unlike adults, may find details of time and place unimportant.¹⁶³

In criminal proceedings, some of these evidentiary and procedural rules (as well as others) have particular application to complainants, whether adults or children, in prosecutions for sexual offences. (Of course, complainants who allege sexual misconduct by their teachers or former teachers may no longer be children when their disclosures are made or when their testimony is sought.) As is the case for children generally, it is also recognized that sexual complainants are often deeply affected by their testimonial involvement and that certain stereotypical notions (discussed below) have been applied in the past to influence the assessment of their credibility or reliability.

The special evidentiary and procedural rules which govern child witnesses and sexual complainants in criminal cases appropriately balance the interests of such witnesses and the need to discover the truth in a manner consistent with the presumption of innocence and the accused's right to make full answer and defence. A proper understanding of these rules does not invite undiscriminating acceptance of any witnesses or any relaxation of the standard of proof¹⁶⁴, but instead, a means to make evidence more accessible to the process. It is not the accused alone who have rights which are to be safeguarded. Child witnesses or sexual complainants must be treated with due regard for their dignity and legitimate privacy interests; the potentially devastating effects of the court process upon them should be recognized; and their evidence (and that of all witnesses) should be evaluated free from speculative myths, stereotypes and generalized assumptions.¹⁶⁵

¹⁶³ *R. v. W.(R.)* (1992), 74 C.C.C. (3d) 134 (S.C.C.); Chapter 1, "Psychological Studies on the Reliability of Children's Testimony", in Ontario Law Reform Commission, *Report on Child Witnesses*, *supra*.

¹⁶⁴ See *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 200 at 219-220 (S.C.C.) *per* Wilson J.

¹⁶⁵ "Speculative myths, stereotypes and generalized assumptions", a phrase adopted from the Supreme Court of Canada's decision in *R. v. Mills* (1999), 139 C.C.C. (3d) 321

In administrative proceedings, a balance need also be struck between the interests of the child witness or sexual complainant and those of the adverse party. Concerns for the dignity and legitimate privacy interests of child witnesses or sexual complainants remain significant. Such witnesses may be no less devastated by a requirement that they need testify in non-criminal proceedings. Indeed, the requirement that victims testify in non-criminal proceedings, following their criminal testimony, can constitute a re-victimization, with profound physical and emotional consequences.

My review leads me to conclude that some administrative tribunals give inadequate consideration to the needs of child witnesses or sexual complainants by approaching the issue as though they were conducting a criminal trial. There are obvious and important distinctions between criminal and administrative proceedings. It should be remembered that, in some areas, special and more relaxed evidentiary and procedural rules apply to administrative proceedings, such as the rules found in sections 18.1 to 18.6 of the *Ontario Evidence Act*¹⁶⁶ ("OEA"). These rules, which are not always known or understood, strike an appropriate balance between the interests of witness and responding parties, and should be utilized in administrative proceedings.

Indeed, several rules of practice adopted by the Ontario College of Teacher's Discipline Committee may be less mindful of the interests of witnesses than the *Ontario Evidence Act* provisions. The absence of appropriate rules, the existence of rules which fail to strike the appropriate balance between competing interests or the failure at times to understand or apply existing rules may all result in gratuitous harm to the child witness or sexual complainant which is unnecessary to vindicate the interests of the opposing party. Similarly, the application of stereotypical or discredited assumptions about child witnesses or sexual complainants in non-criminal proceedings might produce unjust or inaccurate findings in those proceedings.

(S.C.C.) are also referred to simply as stereotypes or stereotypical assumptions in this chapter.

¹⁶⁶ R.S.O. 1990, c. E.23, as amended.

Recommendation 17: General approach to students as witnesses or sexual complainants

17. Administrative tribunals need to ensure that students who are witnesses or sexual complainants are treated with due regard for their dignity and legitimate privacy interests; that they remain mindful of the potentially devastating effects of the legal process upon these students; and that their evidence (and that of all witnesses) is evaluated free from speculative myths, stereotypes and generalized assumptions. These responsibilities are best discharged through an understanding and application of evidentiary and procedural rules which appropriately recognize and accommodate their interests in a way compatible with the interests of the adverse parties.

My specific recommendations for change (outlined in the pages which follow) are designed to address what evidentiary and procedural rules should apply to these proceedings and, as well, to ensure that these rules are known to the parties and to the decision-makers and are adopted in practice. This chapter also highlights the stereotypical notions which need be avoided in the assessment of credibility and reliability.

I should note that counsel for teachers' unions and school boards are agreed that many of the arbitrators experienced in this area already make significant efforts to accommodate vulnerable witnesses and avoid the stereotypical assumptions described in this Report. Nonetheless, it remains important to outline the evidentiary and procedural rules applicable to these administrative proceedings.

All of this assumes that students or former students need testify in these proceedings. This section of the Report first examines when and to what extent children or sexual complainants need provide *viva voce* testimony in administrative proceedings. Too little attention has been given to this issue, particularly where children or sexual complainants have previously testified in criminal proceedings. Accordingly, my recommendations address these issues, as well as the use generally to be made of evidence, findings and reasons for judgment in the related criminal proceedings.

i) Obviating the Need for Student Testimony

Criminal Proceedings

Often, students describe their sexual victimization to school staff, children's aid society workers, police, close friends and family. These statements are made outside of court. Sometimes, they are the product of interviews; other times, they are spontaneous utterances. The complete account of the abuse frequently emerges through incremental disclosures. For these students or former students, it often becomes a real ordeal, sometimes months or years later, to recall and, thereby, relive this sexual abuse in a courtroom setting. Indeed, students may be unable, by reason of their age, emotional trauma, the passage of time, or other factors to provide a full and accurate account to the court, or to testify at all. Or, they may be able to testify, but at significant emotional expense.

Generally, out-of-court statements cannot be introduced in a criminal case as proof of the truth of their contents. This is known as the hearsay rule. This reflects a well-established recognition of the dangers associated with out-of-court statements. The absence of an oath or solemn declaration when the statements were made, the inability of the trier of fact to assess the demeanour and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to ensure that the witness actually said what is claimed) and the lack of contemporaneous cross-examination by the opponent are all said to render it difficult for a trier of fact to properly assess the reliability and credibility of the out-of-court statement.¹⁶⁷

In the early 1990's, the Supreme Court of Canada recognized that out-of-court statements may be admitted for the truth of their contents where their admission is reasonably necessary to the determination of a fact in issue, and where the circumstances surrounding these statements provide sufficient indicia of reliability.¹⁶⁸ For convenience, this two-pronged test is often referred to as the "necessity" and "reliability" exception or by reference to *R. v.*

¹⁶⁷ *R. v. F.(W.J.)*, *supra* at 14-15; *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257 at 21-272 (S.C.C.).

¹⁶⁸ The party tendering a hearsay statement must establish its reliability and the necessity of its admission on a balance of probabilities.

*Khan*¹⁶⁹ and *R. v. Smith*¹⁷⁰, two of the earliest cases decided by the Supreme Court of Canada which recognized and applied this test.

This exception has been most frequently applied to admit into evidence the out-of-court statements of children, typically in proceedings involving sexual offences. Chief Justice Lamer noted that the Supreme Court of Canada has "properly taken up its role in protecting the most vulnerable members of our society by recognizing the trauma that children who are victims of horrible crimes may face in court and by interpreting the *Khan* and *Smith* principles in an appropriately flexible fashion."¹⁷¹

In *R. v. Khan*, the Court noted that considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant to the issue of reliability. Matters relevant to reliability will vary with each child and the circumstances of each case.¹⁷²

In *R. v. Rockey*¹⁷³, the Court concluded that, in the context of a child declarant, reasonable necessity may be made out where the child is incompetent, unable or unavailable to testify; the trial judge is satisfied, based on psychological assessments, that testimony in court might be traumatic for or cause harm to the child; or the child does testify and the trial judge is satisfied that the admission of the hearsay statements is reasonably necessary to put a full and frank account of the child's version of relevant events before the judge or jury.¹⁷⁴

¹⁶⁹ (1990), 59 C.C.C. (3d) 92 (S.C.C.).

¹⁷⁰ (1992), 75 C.C.C. (3d) 257 (S.C.C.).

¹⁷¹ *R. v. F. (W.J.)*, *supra*, at 6. See also *R. v. Rockey* (1996), 110 C.C.C. (3d) 481 (S.C.C.).

¹⁷² *R. v. Khan*, *supra*, at 106.

¹⁷³ *R. v. Rockey*, *supra*.

¹⁷⁴ As a preliminary matter, a court must be satisfied that the party seeking to tender the out-of-court statement is unable to obtain evidence of a similar quality from another source: *R. v. B.(K.G.)*, *supra*.

In *R. v. F. (W.J.)*¹⁷⁵, the Supreme Court of Canada explored how the prosecution might prove that a child witness is unable to testify. In that case, the complainant, then six-and-a-half years old, testified in a cleared courtroom, behind a screen and with a support person present. Nonetheless, she did not answer when asked about the alleged sexual assault and did not adopt a videotape of her extensive account given previously to the police. The Court's majority concluded that the child was effectively "frozen" and could not testify.

If a child's evidence is unavailable, despite reasonable efforts to obtain it, necessity may be established. Evidence as to the reason *why* a child fails to give evidence in court, while often useful, is not essential. Indeed, the requirement of necessity may be established on the basis of the witness' behaviour in court. If the circumstances reveal that the child cannot, for whatever reason, give evidence in a meaningful way, then the trial judge may conclude that it is self-evident, or evident from the proceedings, that out-of-court statements are "necessary" if the court is to get the evidence and discover the truth of the matter. Fear or disinclination alone will not constitute necessity.

Administrative Proceedings

The rules governing admissibility of evidence in administrative hearings are much more relaxed than in criminal proceedings. Section 15(1) of the *Statutory Powers Procedure Act* ("SPPA"), which applies to proceedings before an Ontario College of Teachers discipline hearing, provides that a tribunal may admit relevant testimony or documents as evidence at a hearing, whether or not given under oath or affirmation or admissible as evidence in a court.¹⁷⁶

Arbitrations under the *Labour Relations Act*, 1995 ("LRA") are also governed by extremely broad rules of admissibility. Section 48(12)(f) of the

¹⁷⁵ *Supra*.

¹⁷⁶ Nothing is admissible that would be inadmissible in court by reason of privilege or that is made inadmissible by statute: section 15(2).

Act empowers an arbitration board to accept oral or written evidence as it, in its discretion, considers proper, whether admissible in a court of law or not.¹⁷⁷

It follows that the Discipline Committee of the College and an arbitration board considering a grievance against disciplinary measures imposed by a school board have jurisdiction to receive and consider hearsay evidence which is not admissible in court.¹⁷⁸ However, the rules of natural justice are unlikely to permit the *unqualified* reception of hearsay evidence which, if accepted for its truth, would be largely determinative of the issues.¹⁷⁹

In *Re Khan and College of Physicians and Surgeons of Ontario*,¹⁸⁰ the Ontario Court of Appeal addressed the admissibility of a child's hearsay statements in administrative proceedings. *Re Khan*¹⁸¹ involved an allegation of professional misconduct by the College of Physicians and Surgeons arising from the same activity alleged in the criminal case. Though the child, now eight years old, testified before the Discipline Committee, her account, which lacked the detail of her original complaint, was supplemented by her mother's evidence as to what the child had told her. The Ontario Court of Appeal accepted this hearsay evidence, as indicia of reliability were present, and it

¹⁷⁷ A board of arbitration is clearly not confined by the rules of admissibility which apply to court proceedings. A decision by a board to exclude evidence because it is inadmissible in the courts or because the board is bound by decisions of other arbitration boards would constitute an obvious error of law. In addition, the discretion of a board would be improperly exercised if it acted in the belief that these legal rules or prior arbitration decisions were binding upon it: *Re City of Toronto and Canadian Union of Public Employees, Local 79* (1982), 35 O.R. (2d) 545 (C.A.).

¹⁷⁸ See, e.g., *Lischka v. Criminal Injuries Compensation Board* (1982), 37 O.R. (2d) 134 (Div. Ct.); *Commodore Business Machines Ltd. v. Ontario (Ministry of Labour)*, (1984), 49 O.R. (2d) 17 (Div. Ct.).

¹⁷⁹ *Re B and Catholic Children's Aid Society of Metropolitan Toronto* (1987), 59 O.R. (2d) 417 (Div. Ct.). A 12-year-old first alleged and then denied she had been sexually abused in out-of-court statements. A hearing officer, determining whether B's name should be expunged from the child abuse register, accepted the child's first account. The Divisional Court held this to be a denial of natural justice in the particular circumstances. It noted the absence of cross-examination and any indication that the child could not testify.

¹⁸⁰ (1992), 76 C.C.C. (3d) 10 (Ont. C.A.).

¹⁸¹ The disciplinary proceedings took place after the Court of Appeal had reversed Khan's acquittal and ordered a new trial but before the Supreme Court affirmed that order.

was reasonably necessary to obtain an accurate and frank rendition of the child's detailed version of events.¹⁸² Of course, this hearsay evidence went to the heart of the allegations being made against Khan.

In so ruling, the Court made clear that the necessity and reliability criteria have equal applicability to civil or administrative proceedings with this important caveat:

That is not to say that the determination of whether those criteria [of necessity and reliability] have been met will be the same regardless of the nature of the proceedings, but only that both factors will have to be addressed in both types of cases.¹⁸³

It is appropriate to apply a lower threshold of reliability and necessity in civil and, most particularly, in administrative proceedings. This accords with the interests at stake in those proceedings. It accords with the greater accommodation appropriately shown to young witnesses in non-criminal proceedings, fully developed elsewhere in this chapter.¹⁸⁴ In the context of hearsay statements by student complainants or witnesses in sexual misconduct cases, it also accords with the position advanced throughout this chapter that,

¹⁸² Factors relevant to a determination of reasonable necessity when the child testifies include the age of the child at the time of the alleged event and at the time he or she testifies; the manner in which the child gives his or her evidence, including the extent to which it is necessary to resort to leading questions to elicit answers from the child; the demeanour of the child when testifying, the substance of the child's testimony, particularly as it reflects on the coherence and completeness of the child's description of the events in question; any professed inability by the child to recall all or part of the relevant events; any evidence of matters which occurred between the event and the time of the child's testimony which may reflect on the child's ability to provide an independent and accurate account of the events in issue; and any expert evidence relevant to the child's ability at the time he or she is required to give evidence to comprehend, recall or narrate the events in issue: *Re Khan, supra*, at 26.

¹⁸³ *Re Khan, supra*, at 21.

¹⁸⁴ For example, section 18.1(3) of the *Ontario Evidence Act* confers the authority upon a court or tribunal to receive the *viva voce* evidence of a child under 14, even where he or she does not know what it means to tell the truth, provided the evidence is "sufficiently reliable". The *Ontario Evidence Act* also contains various provisions which give greater prominence to the best interests of the child witness than given in criminal proceedings: sections 18.1 to 18.6.

in striking the balance between competing interests, the rights of children or sexual complainants may acquire equal or greater prominence, particularly where the adverse party cannot lay claim to a right to make full answer and defence arising out of a potential deprivation of liberty. In relation to administrative proceedings, it also accords with the very broad discretion conferred upon administrative tribunals to admit relevant evidence and the less formalistic approach adopted generally by such tribunals.¹⁸⁵

This means, for example, that in administrative proceedings, a determination of reasonable necessity may be made with greater regard to the best interests of a child witness. These interests include the need to avoid or reduce the detrimental impact of recounting sexual misconduct in a legal proceeding. A determination of reasonable necessity that is made with greater regard to the best interests of a child witness means that (i) the type and degree of emotional impact that is required to demonstrate reasonable necessity is diminished; and (ii) the type of proof required to establish impact is less exacting. Something less than "proof of *inability* or *unavailability* to testify" or "*psychological assessments* formally proving potential trauma or harm to the child" should be required in administrative proceedings.

Further, where the reliability of a hearsay statement is particularly high, a compelling argument can be made that a determination of reasonable necessity can be dispensed with.¹⁸⁶ There is support for this approach in the United States, where the admission of hearsay evidence in administrative proceedings has been held not to violate due process as long as it bears some indicia of reliability. No requirement of necessity need always be established.¹⁸⁷ In my view, the prior testimony of a witness taken under oath or solemn affirmation, who was cross-examined at an earlier proceeding by

¹⁸⁵ Of course, hearsay evidence admitted at a criminal trial as reasonably necessary and reliable should, *a fortiori*, absent a material change in circumstances, almost inevitably be admitted in non-criminal proceedings.

¹⁸⁶ *Re B and Catholic Children's Aid Society of Metropolitan Toronto, supra*, and *Re Khan supra*, which discussed necessity considerations in administrative hearings, each involved non-testimonial hearsay.

¹⁸⁷ *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), cert. denied, 452 U.S. 906; *Johnson v. U.S.A.*, [1980] CADC-QL 96 No. 79-1154 (U.S. Ct. Of Appeals, D.C. Cir. 1980).

the party against whom the evidence is to be used, will often be highly reliable hearsay.¹⁸⁸

Prior Testimony as Admissible Hearsay¹⁸⁹

In Canada, former testimony has been "pigeonholed" within a traditional exception to the hearsay rule, providing for these pre-conditions for admissibility: (i) unavailability of the witness; (ii) substantial similarity of the parties; (iii) substantial similarities of the material issues to which the evidence is relevant; and, (iv) an opportunity to cross-examine the witness at an earlier proceeding by the person against whom the evidence is to be used.¹⁹⁰

The modern "principled approach" to hearsay evidence favours the broader admissibility of prior testimony, particularly in administrative proceedings. "Unavailability of the witness" corresponds to considerations of necessity. As I have already noted, "reasonable necessity" has not been confined to "unavailability", even in the criminal context, and, in any event, administrative or civil proceedings invite a more relaxed approach. "Substantial similarity of the parties" is overly restrictive.¹⁹¹ The purpose of this pre-condition (as well as the pre-condition that the material issues to which the evidence is relevant are substantial similar) is to ensure that the party against whom the prior testimony is now sought to be introduced was

¹⁸⁸ Cross-examination under oath or solemn affirmation is said to imbue the evidence with circumstantial guarantees of trustworthiness. See, e.g., *R. v. Hanna* (1993), 80 C.C.C. (3d) 289 (S.C.C.); *R. v. Biscette* (1995), 99 C.C.C. (3d) 326 (Alta. C.A.); *R. v. Hawkins* (1996), 111 C.C.C. (3d) 129 (S.C.C.). Evidence given pursuant to a promise to tell the truth would likely be similarly analyzed.

¹⁸⁹ Where testimony was heard in a proceeding which resulted in a finding of guilt, the extended analysis which follows need not obtain. The effect of a finding of guilt is later addressed.

¹⁹⁰ *Walkerton (Town) v. Erdman Estate* (1894), 28 S.C.R. 352.

¹⁹¹ Courts in Canada and the United States have held that where a defendant has already received a full and fair opportunity to have an issue raised, tried and determined in an earlier criminal proceeding, he or she may even be estopped from re-litigating it in a subsequent civil case, notwithstanding that the parties to each proceeding are not identical. Without defining here the precise boundaries of issue estoppel, suffice it to say that identity of parties, a historical pre-condition to issue estoppel, has been modified to more accurately reflect the underlying rationale of the rule.

sufficiently motivated to cross-examine the witness adequately in the prior proceedings with respect to the subject-matter on which the testimony is now to be tendered.¹⁹² Any deficiencies in the cross-examination will generally affect the weight, not the admissibility, of the testimonial hearsay unless the adverse party was effectively deprived of the opportunity to cross-examine.

During this review, the undesirability of exposing student witnesses to a multiplicity of proceedings was emphasized by various interested parties who met with me. Students are sometimes obligated to testify in both criminal and disciplinary proceedings. Occasionally, they may be called upon to testify both in grievance hearings and proceedings before the College's Discipline Committee. Each of these proceedings may themselves involve multiple interviews, formal statements and repeated testimony at preliminary inquiries, discoveries, trials and hearings. Testimony may span many days. For those students who were victims of sexual misconduct by their teachers, the multiplicity of proceedings is at times unbearable, contributes to their emotional distress, interferes with counselling and delays well-being, discourages seeking legitimate redress for wrongs, and ultimately deters other victims from coming forward. A principled approach to testimonial hearsay can better address these concerns in a way which is fair and not incompatible with the rules of natural justice.

Counsel for several teachers' associations contend that a tribunal would be deprived of the opportunity to evaluate the witness' demeanour if he or she fails to take the stand. While this may be so, it does not overcome the compelling reasons that favour admissibility *in the context of non-criminal proceedings*. Given the level of reliability assured through the opportunity to cross-examine in a prior legal proceeding, the physical absence of the witness ought not to tip the balance in favour of automatic exclusion. A discretion exists which can be informed by all these concerns. It follows that prior testimony should frequently be admitted in administrative proceedings. The countervailing interests favouring admissibility in the context of non-criminal proceedings are substantial.

It was also contended that cross-examination at a criminal trial may not address (or need to address) issues more relevant to a later administrative hearing. For example, the complainant may be vigorously cross-examined on

¹⁹² *Smith v. Goulet* (1975), 5 O.R. (2d) 337 (C.A.).

a claim of sexual assault but left unchallenged as to a claim of sexual harassment, which has more limited relevance to the criminal case. Accordingly, it is said, the admission of the testimonial hearsay at a subsequent disciplinary hearing conducted by the College would create an unfairness to the teacher against whom the evidence is tendered. Further, a fuller or different cross-examination even on the identical issues may be desirable in the administrative proceedings, given different strategic considerations and perhaps, the mounting of a different defence.

In my view, where the substance of the allegation of professional misconduct is that the teacher engaged in conduct which would amount to a sexual offence, there would likely be a substantial similarity between the material issues to which the evidence has/had relevance and an effective opportunity to cross-examine on those issues. The similarity of issues and the opportunity to cross-examine on those issues by the teacher should generally favour admission of the prior testimony. The prior testimony is only *prima facie* proof. The nature and extent of cross-examination at the criminal trial may properly be considered as a matter of *weight*. As well, as previously indicated, an administrative tribunal always retains the residual discretion to exclude otherwise admissible evidence where fairness so requires.¹⁹³ For example, the fact that the criminal judge rejected the evidence or found it patently unreliable should generally result in exclusion.¹⁹⁴ In those circumstances, it could hardly be characterized as reliable hearsay.¹⁹⁵

Where little or no reliance is being placed upon the alleged criminal conduct (for any variety of reasons) but instead upon sexual harassment or poor teaching practices, the administrative tribunal might well conclude that harassment or poor teaching practices were not material issues in the earlier proceeding and that there was no realistic opportunity to cross-examine on those issues. Hence, that prior testimony might well be excluded.

¹⁹³ See, by analogy: *R. v. Potvin* (1989), 47 C.C.C. (3d) 289 (S.C.C.) respecting the residual discretion conferred upon a judge to exclude prior testimony (such as that given at a preliminary inquiry) when tendered at trial, despite proof of the preconditions to admissibility.

¹⁹⁴ Of course, this is to be distinguished from a determination that the evidence leaves the trier of fact in a state of reasonable doubt.

¹⁹⁵ Of course, similar considerations would apply to prior testimony at an arbitration sought to be used before the College Discipline Committee.

Sometimes, the witness need be tendered, given *additional* issues which only that witness can address. The prior testimony may nonetheless be appropriately admitted into evidence to obviate the need for a detailed and painful examination-in-chief of the witness. Adoption of prior statements to accommodate a witness who must give evidence is later addressed.

Finally, to state the obvious, it is clear that prior testimony can always be received by an administrative tribunal or a court on consent.¹⁹⁶ I am advised that, in many disciplinary cases, it is intention which is at issue rather than the acts alleged; for example, a student may describe touchings which are admitted by the teacher but are explained to have been innocently motivated and appropriate. It may be quite unnecessary for the student's criminal testimony to be repeated, given the real issues in the administrative proceedings. Nonetheless, these students are sometimes brought forward to duplicate their uncontentious testimony, causing undoubtedly gratuitous distress. Consideration should always be given to the undesirability of subjecting such witnesses to a multiplicity of proceedings without good cause.

Recommendations 18 to 22: Admissibility of hearsay evidence in administrative proceedings

18.1 Hearsay statements may be admitted for the truth of their contents where their admission is reasonably necessary to the determination of a fact in issue, and where the circumstances surrounding these statements provide sufficient indicia of reliability.

¹⁹⁶ Section 15.1 of the *SPPA* permits the use of previously admitted evidence before administrative tribunals on consent. In *The Carleton Roman Catholic Separate School Board and The Ontario English Catholic Teachers' Association* (January 31, 1987) (Fraser) [unreported], the Board of Arbitration admitted, on consent, the transcript of the complainant's evidence taken at the grievor's preliminary inquiry and trial for one count of sexual assault. The grievor was acquitted. The transcripts were admitted with the consent of all parties. The Board of Arbitration noted (at 4):

counsel for both parties at this hearing considered it undesirable that either child be subject to any further proceedings in respect of the allegations of sexual assault. The board agrees with the wisdom of this approach, and concurs wholeheartedly with the decision not to call those infant witnesses once more to give evidence.

18.2 In administrative proceedings, a lower threshold of necessity and reliability should be applied to the hearsay statements of witnesses, particularly in cases involving alleged sexual misconduct. This accords with the nature of these proceedings and the appropriate balance between competing interests.

18.3 A determination of reasonable necessity should be made with greater regard to the best interests of a child witness or sexual complainant. These interests include the need to avoid or reduce the detrimental impact of recounting sexual abuse in a legal proceeding. This means that (i) the type and degree of emotional impact that is required to demonstrate reasonable necessity is diminished; and (ii) the type of proof required to establish impact is less exacting. Something less than "proof of *inability* or *unavailability* to testify" or "*psychological assessments* proving potential trauma or harm to the child" is therefore required in administrative proceedings.

In Chapter VI, policies and protocols that favour the early videotaping of students' statements are recommended. Such videotaped statements often represent the kind of hearsay evidence that can be admitted on a principled basis, most particularly in administrative proceedings.

19.1 In administrative proceedings, subject to a residual discretion to exclude, a testimonial statement should generally be admissible as evidence in the proceedings, without further proof where:

- (a) **the party against whom the statement is sought to be introduced was a party to the proceedings in which the testimony was formerly admitted;**
- (b) **there is a substantial similarity between the material issues to which the statement was/is relevant in the former and present proceedings; and**
- (c) **there was an opportunity to cross-examine the witness at the former proceeding by the party against whom the statement is to be used.**

A determination of reasonable necessity should not generally be a precondition to the admissibility of testimonial statements, given the

level of reliability assured through cross-examination. However, a lack of reasonable necessity may inform the exercise of discretion.

20. The Rules of Procedure of the Ontario College of Teachers Discipline Committee should be amended to specifically address prior testimonial statements. Consideration should also be given to amending the *Statutory Powers Procedure Act* and the *Ontario Evidence Act* to similar effect. Arbitration boards acting pursuant to the *Labour Relations Act*, 1995 should also be guided by these evidentiary rules.¹⁹⁷

21.1 Section 17 of Form 6A, "Pre-Hearing Conference Memorandum", of the Rules of Procedure of the Ontario College of Teachers Discipline Committee should be amended to specifically require consideration of whether there is any need to hear *viva voce* evidence from a child witness or sexual assault complainant. The form should indicate:

- (a) whether an application will be brought to dispense with the need to hear from a witness *viva voce*;
- (b) alternatively, whether an application will be brought to accommodate a vulnerable witness through listed procedures;¹⁹⁸ and
- (c) the respondent's position on such applications.

22. The undesirability of subjecting children or complainants in cases involving sexual misconduct to a multiplicity of proceedings in which they are to testify should figure prominently in an assessment as to whether their hearsay statements should be tendered as evidence, without further proof.

¹⁹⁷ Though the *Ontario Evidence Act* has application to such arbitration boards, it is clear that the *OEA* is not regarded as binding. This point is later addressed in the context of statutory provisions which accommodate witnesses who must give evidence.

¹⁹⁸ These are discussed later in this chapter.

Where a finding of guilt has been made

The fact that a teacher has committed certain crimes (earlier discussed) has obvious relevance to the administrative proceedings discussed in this Report. For example, sexual assault of a student undoubtedly constitutes professional misconduct and just cause for dismissal.

Under section 22.1 of the *Ontario Evidence Act*, proof that a teacher has been found guilty of a crime anywhere in Canada constitutes *prima facie* proof that the crime was committed for the purposes of subsequent administrative or civil proceedings.¹⁹⁹ A finding of guilt is more inclusive than a conviction. Where an accused pleads guilty or is found guilty, the court can grant an absolute or conditional discharge for certain offences, instead of convicting the accused.²⁰⁰

Under section 22.1(3), proof of a finding of guilt can be achieved through the filing of a Certificate of Conviction or Discharge.

Since the Certificate is only admitted as *prima facie* proof, its admissibility is not dependent upon an identity between the issues in the criminal and non-criminal proceedings.²⁰¹

Where the conduct which constitutes the crime is the gravamen of the professional misconduct alleged before the Discipline Committee, or the very basis of the dismissal which is subject to grievance before a board of arbitration, a Certificate of Conviction or Discharge should, in most cases, obviate the necessity of student testimony.

Circumstances will arise where the information appearing on the face of the Certificate of Conviction or Discharge fails to adequately convey what

¹⁹⁹ Section 22.1(1). This is conditional upon the unavailability of appellate relief. Section 22.1(1) applies whether or not the convicted or discharged person is a party to the proceeding.

²⁰⁰ Section 730 of the *Criminal Code*.

²⁰¹ In *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 at 7 (Ont. C.A.), a Certificate of Conviction for defrauding a drug supplier was admitted against a pharmacist at his discipline hearing for professional misconduct.

it was that the accused did. For example, a sexual assault may involve forced intercourse or a touching. This distinction may not be significant in some proceedings—the commission of certain crimes should inevitably result in termination of employment and revocation of a teacher's certificate regardless of the ways in which those crimes were committed. However, the nature and extent of the criminal conduct, and the surrounding circumstances, are sometimes relevant to what disciplinary measures should be imposed short of termination or revocation. In these situations, the findings of fact which support the guilty verdict are of importance.

Findings of fact are generally contained in reasons for judgment or sentence. Where a jury has rendered a guilty verdict, the trial judge is obligated to determine, as best he or she can, the facts upon which the verdict was based. This determination is, again, often contained in reasons for sentence.

In my view, the findings of fact contained in such reasons for judgment or reasons for sentence explain what it was that the accused was found guilty of, and should be admitted in subsequent non-criminal proceedings, at a minimum, as *prima facie* evidence of those facts. The admission of these reasons should be regarded as incidental to the Certificate of Conviction or Discharge.²⁰² This approach appropriately balances the competing interests identified throughout this chapter, the high degree of reliability associated with findings of fact in criminal proceedings and the undesirability of subjecting children or complainants in cases involving sexual misconduct to a multiplicity of proceedings in which they are to testify. Indeed, a compelling argument can be made that criminal findings of fact estop the teacher from relitigating those findings in subsequent proceedings and thus, constitute more than *prima facie* proof. It is unnecessary to resolve this issue since it did not commonly arise in the cases that I examined.

²⁰² See, e.g., *Peterborough County Board of Education v. Ontario Public School Teachers' Federation (Peterborough District)*, [1998] O.J. No. 3149 (Div. Ct.)(QL), rev'd *Re Peterborough County Board of Education and Ontario Public School Teachers' Federation* (May 20, 1997)(Bendel) [unreported]; *Re Roman Catholic Separate School Board of the District of Sudbury and Association des enseignantes et enseignants franco-ontarien(ne)s (Sudbury Separate Schools)* (February 4, 1993) (Bendel)[unreported], rev'd sub nom *Conseil Scolaire des Écoles Séparées Catholique du District de Sudbury c. Assn. Des Enseignantes and Enseignants Franco-Ontariens (Sudbury Séparé)*, [1993] O.J. No. 2616 (C.A.); and *Re Ontario Public School Teachers Federation and Perth County Board of Education* (April 19, 1995) (McKechnie)[unreported].

The transcripts of a criminal trial that has resulted in a finding of guilt may, again, explain the finding of guilt and be admissible on that basis (apart from the admissibility of prior testimonial statements on the basis reflected in my earlier recommendation). Care must be taken in evaluating such transcripts on this basis, since a finding of guilt need not entail acceptance of all of the evidence marshalled in support of the prosecution. Where the trial judge finds that the complainant's evidence as to what transpired is true but does not fully articulate what it was that the complainant said, surely a transcript of the complainant's evidence can be admitted into evidence in subsequent proceedings as incidental to the Certificate of Conviction or Discharge and as explaining the finding of guilt.

Counsel for school boards and teachers' unions report that, generally, findings of guilt obviate the need for student testimony or reduce the scope of such testimony. Indeed, in many cases, disciplinary hearings following a finding of guilt are uncontested and grievances against dismissal not pursued. However, there remain some cases where administrative tribunals do not accept certificates of conviction or discharge for their appropriate effect, draw unwarranted distinctions between convictions and discharges or refuse to permit any additional material from the criminal case which might explain the convictions or discharges. Concerns also remain that student testimony may be unnecessarily tendered to prove sexual misconduct, in the face of findings of guilt. The following recommendations address these issues.

Recommendations 23 to 25: Previous findings of guilt

23.1 A Certificate of Conviction or Discharge is *prima facie* proof that the crime was committed and admissible as such in subsequent proceedings.

23.2 Where there have been findings of guilt, the specific findings of fact contained in reasons for judgment or reasons for sentence should be similarly admitted as *prima facie* evidence of those facts. Such findings of fact explain the finding of guilt and should be regarded as incidental to the Certificate of Conviction or Discharge. In some circumstances, transcripts of the criminal proceedings may also be properly used to explain the finding of guilt and should be regarded as incidental to the Certificate of Conviction or Discharge.

24. The Rules of Procedure of the College Discipline Committee should be amended to specifically address prior testimonial statements. Consideration should also be given to amending section 22.1 of the *Ontario Evidence Act* to similar effect. Arbitration boards acting pursuant to the *Labour Relations Act*, 1995 should also be guided by these evidentiary rules.

25. The undesirability of subjecting children or complainants in cases involving sexual misconduct to a multiplicity of proceedings in which they are to testify should figure prominently in an assessment as to whether their testimony is needed in proceedings which follow a finding of guilt.

Where no finding of guilt has been made

An acquittal does not foreclose subsequent administrative proceedings for two reasons. First, proof beyond a reasonable doubt represents a higher burden of proof than that needed to establish sexual misconduct in non-criminal proceedings. Second, conduct which does not amount to a crime may nonetheless constitute disciplinary misconduct.²⁰³

I have already addressed, both in the context of reliable hearsay and in the context of materials incidental to findings of guilt, how prior testimony can or should be used. I have also addressed the use of findings of fact made in support of a finding of guilt. To what extent can findings of fact made in criminal proceedings which have not resulted in a finding of guilt be introduced into evidence in subsequent non-criminal proceedings?

Such findings of fact may be made under a variety of circumstances. A trial judge may find beyond a reasonable doubt that the accused engaged in the alleged acts but conclude that they do not constitute a crime (or the crime charged) or that the requisite criminal intent has not been proven beyond a reasonable doubt. A judge may express the view that the accused probably

²⁰³ *Magder v. The Board of Education for the City of Toronto* (22 May 1980), Toronto file no. 513/78 (Ont. Div. Ct.); *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977), 76 D.L.R. (3d) 38 at 76 (Ont. Div. Ct.); *Re Pierce and The Lakehead Board of Education* (1994) (Board of Reference) (Kinsman J.) [unreported].

committed the guilty act with the requisite guilty intent, but be left in a state of reasonable doubt. A judge may make findings adverse to a person who is not a party to the criminal proceedings. The possibilities are endless.

The value of these findings of fact obviously varies. A finding beyond a reasonable doubt that a teacher invited a student, for a sexual purpose, to touch him but that the wrong offence has been charged might be treated as more analogous to a finding of guilt and admissible as *prima facie* evidence of his conduct in a subsequent proceeding. The analogy is not perfect, of course. The teacher cannot appeal that finding, given his acquittal. Further, it may have been unnecessary to challenge the complainant's evidence, *for the purposes of the criminal proceedings*, given the fact that the wrong crime had been alleged. On the other end of the spectrum, a judge's "aside", in the course of acquitting the accused, that he *might* have committed the crime may demonstrate that the acquittal cannot be taken as a complete exoneration for the purposes of subsequent proceedings, but may have little value otherwise. It would be difficult, in any event, to characterize those comments as a finding of fact.

Similar issues arise where findings of fact are made in non-criminal proceedings which are sought to be used in other non-criminal proceedings. For example, an arbitration board may find, on clear and cogent evidence, that a school board had just cause to dismiss its teacher, based upon the teacher's sexual misconduct. A Discipline Committee may similarly find professional misconduct. To what extent can the findings of one administrative tribunal be introduced before the other?

In *Rosenbaum v. Law Society of Manitoba*²⁰⁴, the Manitoba Court of Appeal upheld the decision of the Law Society's discipline committee to admit the finding of a judge in a civil proceeding that a lawyer witness had committed perjury as *prima facie* proof of professional misconduct. The Court of Appeal upheld the Manitoba Queen's Bench which said this:

...I do not take the decision of the House of Lords in *Spackman* to mean that a disciplinary body *must* in all cases treat as *prima facie* evidence every finding by a court in prior proceedings. Much will depend on the particular circumstances in which the proceedings

²⁰⁴ [1984] 4 W.W.R. 95 (Man. C.A.).

were conducted; provided the lawyer is given fair opportunity to adduce further evidence and to submit argument to dispute the accuracy of specific solemn and considered findings, the committee is entitled to exercise its discretion to rely upon the civil proceedings as evidence in support of the charge.²⁰⁵

My recommendations are similar to this approach.

Recommendation 26: Findings of fact

26.1 Findings of fact, other than those which support a finding of guilt, may be treated as *prima facie* evidence of those facts, in the discretion of the administrative tribunal.

26.2 Factors which should inform the exercise of that discretion include:

- (a) the nature of the proceedings in which the findings were made;**
- (b) the significance of the findings to the ultimate determination in the proceedings in which the findings were made;**
- (c) whether the findings of fact were made on a balance of probabilities or beyond a reasonable doubt or otherwise;**
- (d) whether the party against whom the findings were made was a party to the proceedings in which they were made;**
- (e) whether the party against whom the findings were made had an opportunity to challenge the evidence upon which those findings were made;**

²⁰⁵ *Rosenbaum v. Law Society of Manitoba*, [1983] 5 W.W.R. 752 at 759 (Man. Q.B.).

- (f) whether the party against whom the findings were made was motivated to challenge the evidence upon which those findings were made, or the findings themselves.

ii) Accommodating the Student Witness

Introduction

In the preceding section, I examined whether, and to what extent, students need provide testimony in administrative proceedings. Where such testimony cannot be *avoided*, it can be *accommodated* in ways which balance the best interests of both the students and teachers. An examination of the ways in which students can reasonably be accommodated must commence with a brief discussion of the sources for the evidentiary and procedural rules which govern administrative proceedings.²⁰⁶

A discipline committee under the *Ontario College of Teachers Act*, 1996 ("OCTA") and an arbitration board under the *Labour Relations Act*, 1995 are both administrative tribunals.²⁰⁷

These two tribunals look to as many as four different sources for the evidentiary and procedural rules which govern them:

- (1) The *OCTA* and the *LRA*, or regulations, rules or bylaws made pursuant thereto may set out a partial or

²⁰⁶ Though I am not addressing civil actions here, some of the commentary, particularly concerning the *Ontario Evidence Act*, may have application to such actions.

²⁰⁷ The regime under the *Teaching Profession Act* empowered the Relations and Discipline Committee of the Ontario Teachers' Federation ("OTF") to make recommendations to the Minister of Education as to the disposition of a complaint of professional misconduct. The Committee was not an adjudicative body. The regulation under the Act set out a procedural code for the Committee. The provisions of the *Statutory Powers Procedure Act* had no application to the Committee's hearings: *Re Ontario Secondary School Teachers' Federation and Shelton* (1979), 28 O.R. (2d) 218 (Div. Ct.). Given the creation of the Ontario College of Teachers, it is unnecessary to discuss the undoubtedly deficiencies in the *Teaching Profession Act*.

comprehensive code of procedure. Several of the College Discipline Committee's Rules of Procedure have direct application here.

- (2) The *Statutory Powers Procedure Act* sets out rules applicable to some Ontario tribunals, including the College Discipline Committee. The *OCTA* specifically states that its regulations and bylaws prevail, in the event of a conflict with the *SPPA*.²⁰⁸ The *SPPA* does not apply to arbitrations conducted pursuant to the *LRA*.²⁰⁹
- (3) The rules of natural justice, as reflected in the jurisprudence, are applicable to administrative tribunals.
- (4) The *Ontario Evidence Act* applies to both administrative tribunals.²¹⁰ 1995 amendments to the *OEA* contained in sections 18.2 to 18.6 sensitively balance the testimonial interests of child witnesses and those adverse in interest. However, as will be developed below, these provisions are sometimes overlooked.

²⁰⁸ Section 54.

²⁰⁹ Section 3(2) of the *SPPA*.

²¹⁰ In general terms, administrative tribunals do not regard themselves as bound by the *OEA*. This is understandable, given the breadth of discretion conferred upon tribunals to admit evidence, notwithstanding more restrictive provisions in the *OEA*. In *Re Hamilton-Wentworth District School Board and Ontario Secondary School Teachers' Federation (Chaikoff)* (1998), 75 L.A.C. (4th) 289, the arbitration board held, by way of *obiter dictum*, that the *OEA* "may apply [to arbitrations] to the extent that if evidence meets the requirements for admissibility set out in the Act this board of arbitration would be required to admit the evidence". Clearly, boards do not feel compelled to *exclude* evidence which may fail to meet admissibility tests or notice requirements set out in the Act. I need not resolve the precise relationship between the *Ontario Evidence Act* generally and arbitration boards, given my conclusion that boards should be guided by and generally follow those sections of the Act designed to accommodate child witnesses.

Testifying with the Aid of a Screen or Outside the Courtroom

Criminal Proceedings

Where an accused is charged with specified offences, including various sexual offences,²¹¹ and the complainant or any witness, at the time of the trial or preliminary inquiry, is under the age of 18 years or is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, the court may order that the complainant or witness testify outside the courtroom or behind a screen or other device that would allow the complainant or witness not to see the accused, if the court is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant or witness.²¹² The complainant or witness shall not testify outside of the courtroom unless arrangements are made to enable the court and the accused to watch the testimony by means of closed-circuit television or otherwise and the accused can communicate with counsel while watching the testimony.²¹³

Section 486(2.1) reflects recognition that victims of child sexual abuse may be traumatized by the process of testifying and are often afraid of facing their abuser. The section's main objective is to better "get at the truth" by alleviating or reducing the child's concerns about facing the accused.²¹⁴

It need not be evident that the child will suffer exceptional and inordinate stress before an order allowing him or her to testify in the accused's absence will be made. In exercising his or her discretion under this section, the judge may consider evidence of the capabilities and demeanour of the child, the nature of the allegations and the circumstances of the case. The judge may also consider whether or not the accused is represented by counsel. The

²¹¹ Specified offences include sexual interference, sexual exploitation, invitation to sexual touching, child pornography offences, indecent act or sexual exposure or a form of sexual assault.

²¹² Section 486(2.1) of the *Criminal Code*. A screen permits the accused and the trier of fact to see the witness but prevents the witness from seeing the accused.

²¹³ Section 486(2.2) of the *Criminal Code*.

²¹⁴ *R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327 (S.C.C.).

child's dislike of the accused, in and of itself, is insufficient.²¹⁵ Expert evidence is not always necessary to establish the foundation for such an order.²¹⁶ Where the judge determines that he or she must hear from the child witness in support of the prosecution's application, the child may testify behind a screen or outside of the courtroom.²¹⁷

In some jurisdictions, there are courtrooms dedicated to child abuse cases where a screen is permanently kept.²¹⁸ In other jurisdictions, such courtrooms are permanently equipped with the technology to facilitate closed-circuit testimony.

Administrative Proceedings

Section 18.4(1) of the *OEA* provides that a witness under the age of 18 may testify behind a screen or similar device that allows the witness not to see an adverse party, if the tribunal is of the opinion that this is likely to help the witness give complete and accurate testimony *or* that it is in the best interests of the witness. The tribunal may order that the witness testify outside the hearing room through closed-circuit television instead of a screen or similar device if it is of the opinion that a screen or similar device is insufficient to allow the witness to give complete and accurate testimony *or* the best interests of the witness require the use of closed-circuit television.²¹⁹ In either case, arrangements need be made to ensure that the members of the tribunal, and the parties to the proceeding and their lawyers can see and hear the witness testify.²²⁰

²¹⁵ *R. v. M.(P.)* (1990), 1 O.R. (3d) 341 at 346 (C.A.).

²¹⁶ *Ibid.*, at 347.

²¹⁷ Section 486(2.11) of the *Criminal Code*.

²¹⁸ For example, courtroom "J" at the Old City Hall Court in Toronto is specifically designed to accommodate young witnesses in child abuse cases. There is always a screen available. The courtroom has also been modified to permit the child witness to enter the courtroom without having to pass by the accused. This is just another example of how a simple adjustment can be made to improve the comfort level of a child witness.

²¹⁹ Sections 18.4(2) and (3) of the *OEA*.

²²⁰ Section 18.4(4) of the *OEA*.

Where the tribunal orders that closed-circuit television is to be utilized, the witness must testify outside the hearing room and his or her testimony shall be shown in the hearing room by means of closed-circuit television.²²¹

Section 18.4 of the *Ontario Evidence Act* significantly differs from its criminal counterpart, section 486(2.1) of the *Criminal Code*. An order that a screen be utilized is to be made under section 18.4 *either* where it is in the best interests of the witness to do so *or* it is likely to help the witness give complete and accurate testimony. It follows that the best interests of the witness alone justify the making of the order.

In my view, the best interests of the witness include the avoidance or reduction of emotional or psychological distress associated with having to confront the adverse party to the proceedings. The tribunal is entitled to consider the recognized benefits associated with a screen (or similar device) and the relatively low threshold represented by the "best interests of the witness". As well, any application for the use of a screen should always be evaluated in the context of the nature of the proceedings and the more generous rules of admissibility which obtain in those proceedings. These permit a greater accommodation to the interests of witnesses than may be seen in criminal cases. Finally, it is significant that the interposing of a screen or television screen cannot be said to represent a significant intrusion upon the interests of the adverse party.

It is also significant that the alternative precondition for the use of the screen — that it is *likely to help* the witness give complete and accurate testimony — may be slightly less demanding than the requirement that the screen be *necessary* to obtain a full and candid account. Having said that, it is my view that the criminal test should not be interpreted in a way that gratuitously exposes a witness to an unwarranted risk of emotional or psychological distress, particularly given the minimal intrusiveness upon the interests of the adverse party that the use of a screen or closed-circuit television represents.

A distinction has sometimes been drawn between the use of a screen and closed-circuit television. A screen has been said to address the problems

²²¹ Section 18.4(3) of the *OEA*.

inherent in a face-to-face confrontation with the adverse party.²²² Testimony outside the hearing room may also protect the witness from the problems associated with a hearing room "full of strangers and rituals."²²³

In Re Ontario Public School Teachers' Federation and Perth County Board of Education,²²⁴ the Board of Education requested that child witnesses be permitted to testify behind a screen about alleged inappropriate physical touching and language. In support of its request, the applicant relied upon section 486(2.1) of the *Criminal Code* and the *Levogiannis* decision (which analyzed the section, in upholding its validity). No reference was made to section 18.4 of the *OEA*. The arbitration board declined to grant the request, stating:

the mere fact that the prospective witnesses are young (eleven and twelve years old), they are students and the Grievor is a former teacher, and the allegations include inappropriate physical touching and inappropriate language are insufficient...to order that all prospective witnesses testify behind a screen.²²⁵

In reaching this conclusion, the arbitration board reasoned that:

in the absence of any evidence that the screen is a safeguard necessary to ensure that a specific witness is unable to give a full and candid account of the facts without it, we are not prepared to order its use.²²⁶

Irrespective of the merits of the particular application, it appears that the applicant's submissions and the arbitration board's decision were reliant upon the criminal test. This reliance upon the criminal rules finds expression,

²²² See *R. v. M.(P.)*, *supra* at 349: "The screen is not intended to insulate the witness from the public but, only, not to allow the witness, while testifying, to see the accused."

²²³ Ontario, Law Reform Commission, *Report on Child Witnesses*, *supra* at 78.

²²⁴ (November 28, 1996) (Hunter)[unreported].

²²⁵ *Ibid.*, at 7.

²²⁶ *Ibid.*, at 8.

as well, in rule 13.01(2) of the College Discipline Committee's *Rules of Procedure* which reads:

The Discipline Committee may order that a vulnerable witness testify outside the hearing room or behind a screen or other device that would allow the vulnerable witness not to see the member if the Discipline Committee is of the opinion that the exclusion is necessary to obtain a full and candid account of the matter.

A "vulnerable witness" is defined in section 1.01 of the *Rules* as a "witness who, in the opinion of the Discipline Committee, will have difficulty testifying or will have difficulty testifying in the presence of a party for appropriate reasons related to age, handicap, illness, trauma, emotional state or similar cause of vulnerability".

It is appropriate, indeed commendable, that the use of a screen or closed-circuit television be extended to vulnerable persons, rather than confined to young persons.²²⁷ However, the requirement that "exclusion is necessary to obtain a full and candid account of the matter" contained in rule 13.01(2) is identical to the language contained in the *Criminal Code*. This rule should, instead, track the more generous language contained in section 18.4 of the *OEA*.

Recommendations 27 to 30: Use of screens and related devices

27. Section 18.4 of the *Ontario Evidence Act* establishes a different threshold than criminal proceedings for the use of a screen or a closed-circuit television. Their use can be justified to protect the best interests of the child witness. The best interests of the child should include the avoidance or reduction of emotional or psychological distress associated with testifying in the presence of the adverse party or in a hearing room.

28. Rule 13.01 of the Ontario College of Teachers Rules of Procedure for the Discipline Committee should be amended to adopt the threshold test contained in section 18.4 of the *Ontario Evidence Act*.

²²⁷ In my view, administrative tribunals and courts have jurisdiction to permit the use of screens or closed-circuit testimony in appropriate cases, other than those statutorily articulated. However, consideration should be given to making this jurisdiction express.

29. Consideration should be given to amending section 18.4 of the *Ontario Evidence Act* to extend to vulnerable witnesses, rather than only young persons.

30. Parties tendering these witnesses should ensure that these witnesses are aware of the potential availability of screens or other devices or closed-circuit testimony in advance of the hearing and should explore their use with these witnesses in appropriate cases.

Apart from the use of devices such as screens or closed-circuit testimony, hearing rooms can be arranged to better accommodate vulnerable witnesses. Criminal courtrooms dedicated to child abuse prosecutions may feature features such as separate access to the witnesses to prevent physical encounters with the adverse party, a child-friendly waiting room or a less formal physical layout. Frequently, arbitration hearings are conducted in less formal, but nonetheless inadequate facilities to accommodate child witnesses or sexual complainants. Though it may be unreasonable to expect administrative tribunals to have dedicated hearing rooms available for these cases, greater sensitivity to such witnesses can be shown in the selection and configuration of these hearing rooms. The use of facilities which better accommodate such witnesses requires no statutory authority and involves no restriction upon the adverse party's rights.

Recommendation 31: Use of appropriate hearing rooms

31. Parties tendering vulnerable witnesses and administrative tribunals are encouraged, in appropriate cases, to utilize hearing rooms which are designated to better accommodate these witnesses or to adapt existing hearing rooms to better accommodate these witnesses.

Support Persons

Criminal Proceedings

Where an accused is charged with specified offences, including various sexual offences,²²⁸ the court may, on application of the prosecutor or a witness who, at the time of the trial or preliminary hearing, is under the age of 14 or who has a mental or physical disability, order a support person of the witness' choice to be present and to be close to the witness²²⁹ while testifying if the proper administration of justice so requires.²³⁰ The support person cannot also be a witness in the proceedings.²³¹ The court may order that the support person and the witness not communicate during the testimony.²³²

In its 1991 *Report on Child Witnesses*, the Ontario Law Reform Commission recognized the important role that a support person can fulfill:

The close presence of a person providing emotional support for the child may be critical in reducing the psychological harm occasioned by testifying in court proceedings. As the Scottish Law Commission states, the presence, close at hand, of a parent or some other trusted adult can, in some cases, give a young child the reassurance that is required for evidence to be given clearly and confidently. Several U.S. states, as well as Queensland and South Australia, have passed statutes permitting child witnesses to have a supportive person present during court proceedings...²³³

²²⁸ The specified offences include sexual interference, sexual exploitation, sexual exploitation of a person with a disability, invitation to sexual touching, child pornography offences, or a form of sexual assault.

²²⁹ In *R. v. Peterson* (1996), 27 O.R. (3d) 739 (C.A.), the Ontario Court of Appeal held that it was appropriate for a child to sit in her father's lap as she testified.

²³⁰ Section 486(1.1 to 1.2).

²³¹ Section 486(1.3) of the *Criminal Code*.

²³² Section 486(1.4) of the *Criminal Code*.

²³³ Ontario, Law Reform Commission, *Report on Child Witnesses*, *supra* at 92-93

Administrative Proceedings

Section 18.5 of the *OEA* provides that during the testimony of a witness under the age of 18, a support person chosen by the witness may accompany him or her. Section 18.5 provides examples of reasons which may cause the court or tribunal to determine that the support person is not appropriate: the court or tribunal is of the opinion that the support person may attempt to influence the testimony of the witness; the support person behaves in a disruptive manner; or the support person is also a witness in the proceeding.²³⁴

This provision is more generous to the child witness than its criminal counterpart. It extends the availability of support persons to witnesses under the age of 18. It also does not call upon the tribunal to determine if the proper administration of justice *requires* that a support person be permitted. Instead, a support person is presumptively permissible, subject to disqualification for specific reasons. This presumptive permissibility is entirely appropriate, particularly since a support person represents *little or no* restriction upon the rights of the adverse party.

The College Discipline Committee Rules of Procedure do provide for the availability of a support person to vulnerable witnesses.²³⁵ The rule's extension to vulnerable persons is, again, commendable. The rule does not fetter the discretion of the Committee in any way. However, the availability of a support person for a witness under the age of 18 should not be dependent upon a finding of vulnerability, but be presumptive. The practical effect of the present rule may well be that support persons will be permitted for young persons. However, the presumptive availability of support person for these young people provides certainty in advance of the hearing, avoids any necessity to show there will be difficulty in testifying and thereby reduces likely distress.

Recommendations 32 to 34: Use of support persons in Ontario College of Teachers discipline hearings

²³⁴ Section 18.5(3) of the *OEA*.

²³⁵ Rule 13.01(01).

32. Rule 13.01(1) of the Rules of Procedure of the Ontario College of Teachers Discipline Committee should be amended to specifically address the availability of support persons for young persons under the age of 18 in conformity with the *Ontario Evidence Act*. The rule permitting otherwise vulnerable persons to testify with the assistance of a support person in the discretion of the Committee should remain.

33. Section 18.5 of the *Ontario Evidence Act* should be adopted and fully utilized in administrative hearings.

34. The party tendering such witnesses should ensure that those witnesses are aware of the potential availability of support persons in advance of a hearing.

Recommendation 35: Extension of victim-witness program

35. Consideration should be given to the extension of victim-witness programs to administrative proceedings.

During this review, I met with crown counsel specializing in child abuse prosecutions, defence counsel with expertise in defending such cases, and with members of the victim-witness program operated under the auspices of the Ministry of the Attorney General. I also met with representatives of the Ontario Child Abuse Centre.

The victim-witness program performs an important service in cases that include child sexual abuse prosecutions. Among its other responsibilities, members of the program provide support for vulnerable witnesses, facilitate meetings with Crown counsel, and attempt to ensure that these witnesses are spared gratuitous trauma. They often serve as the support person approved by the court.

An important feature of the program is that the same support person generally remains involved throughout the entire criminal process. This continuity builds familiarity and trust, and ensures that the witness does not need to explain repeatedly the background events to the support person.

The program does extend to the Criminal Injuries Compensation Board, but remains otherwise uninvolved in administrative proceedings. There

would be an obvious benefit to vulnerable witnesses to have the same support person involved in the administrative proceedings.

Some defence counsel suggest that members of the program sometimes cross the line between supporting witnesses and advocating on their behalf. This can generally be addressed by judges or by adjudicators, should the issue arise in individual cases. It does not provide a basis for eliminating the role of the victim-witness program in criminal and administrative cases.

Cross-Examination by an Unrepresented Accused/Adverse Party

Criminal Proceedings

Where an accused is charged with specified offences, including various sexual offences,²³⁶ the accused shall not personally cross-examine a witness who, at the time of the proceedings, is under 18 years of age unless the proper administration of justice requires the accused to personally conduct the cross-examination. Where the accused is not personally conducting the cross-examination, the court shall appoint counsel for the purpose of doing so.²³⁷

The *Criminal Code* thereby presumes that an unrepresented accused shall not personally cross-examine these young persons. This recognizes that personal cross-examination by the accused may compound any trauma experienced by the witness. It represents a face-to-face confrontation far more immediate and potentially abusive than testimony in the visual presence of an accused.

Administrative Proceedings

Section 18.6 of the *OEA* also provides that a tribunal can prohibit personal cross-examination of a witness under the age of 18 by an adverse party if the tribunal is of the opinion that such a cross-examination would be likely to adversely affect the ability of the witness to give evidence or would

²³⁶ Specified offences include sexual interference, sexual exploitation, sexual exploitation of a person with a disability, invitation to sexual touching, indecent act and sexual exposure, child pornography offences, or a form of sexual assault.

²³⁷ Section 486(2.3) of the *Criminal Code*.

not be in the best interests of the witness.²³⁸ If the tribunal prohibits personal cross-examination by the adverse party, the cross-examination may be conducted in some other appropriate way (for example, by means of questions written by the adverse party and read to the witness by the court).²³⁹

The preconditions to such an order—that the cross-examination would be likely to adversely affect the ability of the witness to give evidence or would not be in the best interests of the witness—are appropriately accommodating to the young witness. The “best interests of the witness” include the avoidance or reduction of emotional or psychological distress associated, in this instance, with personal cross-examination by the adverse party. Though the *Criminal Code* presumptively excludes personal cross-examination in specific kinds of cases in favour of appointed counsel, the nature of administrative proceedings, which are frequently less formal and more commonly do not involve counsel, favours a different approach.

Rules 13.01(4) and (5) of the Ontario College of Teachers Discipline Committee’s Rules of Procedure state:

- (4) The Discipline Committee may order that a member not personally conduct the cross-examination of a vulnerable witness if the Discipline Committee is of the opinion that the order is necessary to obtain a full and candid account of the vulnerable witness’ testimony.
- (5) Where the Discipline Committee makes an order under subrule (4), it may appoint counsel for the purpose of conducting the cross-examination.

In my view, prohibition of a personal cross-examination should not be dependent upon any demonstration that it is necessary to obtain a full and candid account of the witness’ testimony. This represents a threshold which is higher than that imposed by the *OEA* and, indeed, imposes a requirement which is not even contained in section 486(2.3) of the *Criminal Code*. As reflected earlier, the prohibition upon personal cross-examination is not

²³⁸ Section 18.6 of the *OEA*.

²³⁹ Section 18.6(2) of the *OEA*.

designed solely to facilitate a full and candid account but to avoid potential re-victimization.

Recommendations 36 to 37: Personal cross-examination

36. Section 18.6 of the *Ontario Evidence Act* should be adopted and fully utilized in administrative hearings.

37. Rule 13.10(4) of the Rules of Procedure of the Ontario College of Teachers Discipline Committee should be amended to adopt the threshold test set out in section 18.6.

Publication Bans

Criminal Proceedings

Where the accused is charged with specified offences, including various sexual offences,²⁴⁰ the court may direct that the identity of the complainant or of a witness, and any information that could disclose that identity, shall not be published or broadcast.²⁴¹ That information sometimes includes the name of the accused, particularly in cases of domestic abuse.²⁴² The court *shall*:

- (a) at the first reasonable opportunity, inform *any* witness *under the age of eighteen years* and the complainant to proceedings in respect of these offences

²⁴⁰ Section 486(3)(b), a recent addition, clarifies that such an order extends to the complainant or witness respecting multiple offences being dealt with in the same proceedings, where one such offence is a specified offence. Specified offences include sexual interference, sexual exploitation, sexual exploitation of a person with a disability, invitation to sexual touching, indecent act or sexual exposure, or a form of sexual assault (or its predecessor offences).

²⁴¹ Section 486(3 to 3.1) of the *Criminal Code*.

²⁴² It is for this reason that the names of sexual offence cases are often identified by the initials of the accused.

of the right to make an application for such an order;
and

(b) on application made by the complainant, the prosecutor or any such witness, make such an order.²⁴³

A recent amendment also permits such a publication ban respecting the identity of a complainant or witness to be made in non-specified proceedings where the court is satisfied that such an order is necessary for the proper administration of justice.²⁴⁴

It is common practice for the prosecutor, at the outset of a bail hearing, preliminary inquiry or trial, to request a publication ban regarding the identity of a young witness or complainant in a sexual abuse case.

There is no doubt that publication bans upon the identity of a child or sexual complainant may reduce the traumatic effect of their testimony, and generally encourage the reporting or disclosure of sexual abuse. The fact that such publication bans are known to be mandatory, upon request of the witness or prosecutor, further encourages reporting or disclosure and reduces potential trauma.

Since a “complainant” is the alleged victim of a crime and not necessarily a witness to the proceedings, it is clear that section 486 contemplates that publication bans may be granted, whether or not an affected person actually gives *viva voce* evidence in the proceedings.

Administrative Proceedings

Where a publication ban has been imposed in a criminal proceeding, then it must be respected in related non-criminal proceedings. There need be no separate legislative authority for administrative tribunals to take measures to recognize and respect existing orders made in criminal proceedings.

Where there have been no related criminal proceedings (or where no criminal publication ban has been sought or obtained in relation to some or all

²⁴³ Section 486(4) of the *Criminal Code*.

²⁴⁴ Section 486(4.1) of the *Criminal Code*.

of the affected persons), a ban upon the publication of the identity of such persons or information which may lead to their identity may be desirable in administrative proceedings.

The *Ontario College of Teachers Act*, 1996 does not expressly authorize publication bans to be imposed. Neither does the *Statutory Powers Procedure Act*. However, the *SPPA* does expressly authorize administrative tribunals, under certain circumstances, to conduct hearings *in camera*: that is, to exclude the public from even attending those hearings.²⁴⁵ It is well arguable that the more limited restriction represented by a publication ban upon the identity of affected persons is thereby implicitly authorized by the Act.²⁴⁶ However, the matter requires legislative clarification. Administrative tribunals should be fully empowered to order a publication ban in analogous circumstances to those which would entitle witnesses to protection of their identity in criminal proceedings. Further, witnesses should be made aware of the tribunal's power to so order. Most important, in circumstances analogous to section 486(4.1) of the *Criminal Code*, such an order should be mandated, where requested by the affected person or by the party sharing a commonality of interest with that person.

The *Labour Relations Act*, 1995 does not expressly authorize arbitration boards to impose publication bans upon the identity of witnesses. Section 48(12)(i) of the Act does confer the power on the arbitration board "to make interim orders concerning procedural matters". A publication ban upon the identity of a child or complainant may well constitute such an order. Again, this power should be made explicit.

Often, the functional equivalent of a publication ban is imposed by administrative tribunals at present. However, the practice regarding publication bans is uneven and provides another compelling reason for legislative clarification.

²⁴⁵ Section 9(1) of the *SPPA*.

²⁴⁶ As noted, the public is excluded from an *in camera* hearing. A ban upon the publication of a witness' identity does not prevent either the public's attendance at the hearing or the publication, generally, of evidence, submissions or reasons provided at a hearing.

Though students may be extensively referred to in administrative proceedings as the alleged victims of sexual misconduct, they are usually not parties to those proceedings. Further, their evidence may be unnecessary, given the position of the parties. It remains important that adjudicators consider whether a ban on publication should be imposed to protect their identities as affected persons, regardless of whether they formally give evidence.

Recommendation 38: Publication bans upon identity

38.1 The *Statutory Powers Procedure Act* and the *Labour Relations Act*, 1995 should be amended to specifically address publication bans upon the identity of affected persons and information that could disclose their identity. The Ontario College of Teachers Discipline Committee's Rules of Procedure should also specifically address such bans.

38.2 Such amendments should provide, *inter alia*, that:

- (a) publications bans are available, in the least, for witnesses or persons allegedly subjected to sexual misconduct relevant to the proceedings;**
- (b) the tribunal shall inform, at the first reasonable opportunity, any witness under the age of 18 and any person allegedly subjected to sexual misconduct relevant to the proceedings of the right to apply for such an order;**
- (c) such an order *shall* be made upon application of the witness or person allegedly subjected to sexual misconduct relevant to the proceedings or by the party sharing a common interest with that witness or person. (Alternatively, such an order *shall* be made, unless the interests of justice otherwise requires.)**

In Camera Hearings

Criminal Proceedings

Section 486(1) of the *Criminal Code* provides that criminal proceedings shall be held in open court, unless the court is of the opinion, *inter alia*, that it is in the interest of the proper administration of justice to exclude all or any members of the public from the courtroom for all or part of the proceedings.²⁴⁷ The *Code* expressly provides that the proper administration of justice includes ensuring that the interests of witnesses under the age of 18 years are safeguarded in proceedings in which the accused is charged with specified offences, including various sexual offences.²⁴⁸

This provision is designed, in part, to address the difficulties which a child witness may have in recounting his or her complaint publicly. If an *in camera* hearing is ordered, only the judge and/or jury, any support person, the most necessary court staff, the accused, and counsel for the defence and prosecution will normally be permitted to remain in the courtroom.

Administrative Proceedings

Section 9(1) of the *Statutory Powers Procedure Act* provides that an oral hearing shall be open to the public unless the tribunal is of the opinion that, *inter alia*, intimate personal matters or other matters may be disclosed at the hearing of such a nature such that, having regard to the circumstances, the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principles that hearings be open to the public.²⁴⁹ This provision would apply to proceedings before an College discipline committee. It has no application

²⁴⁷ Other criteria for excluding the public are not relevant to this Report. This power may be exercised by any level of court or judicial officer, including a justice of the peace.

²⁴⁸ Section 486(1.1) of the *Criminal Code*. Specified offences include sexual interference, sexual exploitation, sexual exploitation with a person with a disability, invitation to sexual touching, indecent act or sexual exposure, child pornography offences or a form of sexual assault.

²⁴⁹ Rule 5.05(4)(a) of the College Discipline Committee *Rules of Procedure* states that a motion regarding the exclusion of the public from all or part of a hearing may be made to the Committee at the hearing of the allegations.

to arbitrations under the *Labour Relations Act*, 1995 which, I am advised, are often not publicly accessible in any event.

Sections 9(1) of the *SPPA* does not markedly differ from section 486(1) of the *Criminal Code*.

No recommendations need be made respecting *in camera* powers.

Adoption of Videotaped Statements

Criminal Proceedings

Where an accused is charged with specified offences, including various sexual offences, in which the complainant or other witness was under the age of 18 years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness, while testifying, adopts the contents of the videotape.²⁵⁰ A similar provision is available where the complainant or other witness is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability.²⁵¹

A videotaped statement is *adopted* when the witness recalls giving the statement and testifies that he or she was attempting to be honest and truthful when the statement was given.²⁵²

Section 715.1 is designed both to enhance the court's ability to find the truth by preserving a very recent recollection of the critical events, and to reduce the traumatic effect of being abused and having to recall it, particularly for a young person sexually abused by a person in authority. A videotaped

²⁵⁰ Section 715.1 of the *Criminal Code*. Specified offences include sexual interference, sexual exploitation, invitation to sexual touching, indecent act and sexual exposure, child pornography offences or a form of sexual assault.

²⁵¹ Section 715.2(1) of the *Criminal Code*. The court may prohibit any other use of the videotape: section 715.2(2) of the *Criminal Code*.

²⁵² *R. v. F.(C.C.)* (1997), 120 C.C.C. (3d) 225 (S.C.C.).

record of events made in a less forbidding surrounding than a courtroom will reduce the likelihood of inflicting further harm upon the witness.²⁵³

Administrative Proceedings

Adoption of Videotaped Statements

Section 18.3(6) of the *OEA* provides that a videotape of an *interview* with a person under the age of 18 may be admitted in evidence, with leave of the tribunal, if the person, while testifying, adopts the contents of the videotape.²⁵⁴ Unlike section 715.1 of the *Criminal Code*, there is no requirement that the videotape be made within a reasonable time of the events described. Of course, the contemporaneity of the videotape or lack thereof may be relevant to the *weight* given to the adopted testimony. As well, the tribunal can presumably consider the time frame within which the videotape was made in determining whether leave will be granted. However, to repeat a recurring theme throughout this chapter, the balance to be struck between competing interests may be different in criminal and non-criminal proceedings. Accordingly, a strict adherence to the *Criminal Code* preconditions, including contemporaneity, might not reflect the greater accommodation to the vulnerable witness that is permitted in law and contemplated by the Ontario legislation.

Section 18.3(6) is in addition to any rule of law under which a videotape may be admitted into evidence.²⁵⁵ Accordingly, common law admissibility of a videotape, without adoption, as an exception to the hearsay rule, is preserved.

The Ontario College of Teachers Discipline Committee's Rules of Procedure do not address adoption of videotaped interviews.

There appears to be wide consensus that early videotaped interviews with complainants by trained investigators greatly enhance the search for the truth and the ultimate fact-finding function of courts or tribunals. Crown

²⁵³ *Ibid.* at 233-234; *R. v. L.(D.O.)*, 85 C.C.C. (3d) 289 at 309 (S.C.C.).

²⁵⁴ Section 18.3(6) of the *OEA*.

²⁵⁵ Section 18.3(7) of the *OEA*.

counsel who regularly prosecute child sexual abuse cases stressed the desirability of these videotaped interviews. Interestingly, in a recent article in *The Globe and Mail*, "J'accuse: A teacher's worst nightmare",²⁵⁶ which will be discussed fully in Chapter V, a union executive who wants stricter guidelines that will "ferret out real aggressors but protect the innocent" proposes "videotaping pupils immediately when they file their accusations, to prevent any changes in their story".

Recommendations 39 to 42: Adoption of videotaped interviews

39. Early videotaped interviews with complainants and young witnesses by trained investigators greatly enhance the search for the truth and the ultimate find-finding function of courts or tribunals. Protocols between school boards, police and children's aid societies should emphasize the desirability of such interviews.

40. Section 18.3(6) of the *Ontario Evidence Act* should be adopted and more fully utilized in administrative hearings. It should be recognized that the threshold test under section 18.3(6) is different than that established in criminal proceedings.

41. The Ontario College of Teachers Discipline Committee's Rules of Procedure should specifically address the adoption of videotaped interviews.

Earlier, I discussed the admissibility of prior testimonial statements as *prima facie* evidence. Where discretion is appropriately exercised not to admit prior testimonial statements as evidence, consideration should be given to whether the witness should be permitted to adopt his or her prior testimony, rather than requiring a detailed recital of the events in examination-in-chief. In my view, even where the prior testimony is not videotaped, the fact that the testimony has been previously subjected to cross-examination and that the witness will be subject to further cross-examination generally favours such an approach in *administrative proceedings*.

42. The College Discipline Committee Rules of Procedure should specifically address the adoption of prior testimonial statements which

²⁵⁶ I. Peritz, *Globe and Mail* (January 29, 2000).

are not themselves admitted as *prima facie* evidence. Arbitrators under the *Labour Relations Act, 1995* should similarly consider the admission of adopted prior testimonial statements on this basis.

Videotaped Testimony in Advance of a Hearing

Section 18.3(1) of the *OEA* provides that a videotape of the earlier testimony of a witness under the age of 18 may be admitted in evidence, if the tribunal is of the opinion that this is likely to help the witness give complete and accurate testimony or that it is in the best interests of the witness. Again, the best interests of the witness alone justify such an order. In this context, the "best interests of the witness" include the avoidance or reduction of emotional or psychological distress associated with testimony at the hearing itself. The person who is to preside at the hearing and the lawyers for the parties to the proceeding shall be present when the testimony is given and shall be given an opportunity to examine the witness in the same way as if he or she were testifying in the hearing room.²⁵⁷ The provisions permitting use of a screen or support person apply, with necessary modifications when testimony is being videotaped.²⁵⁸ Subject to the tribunal's order in exceptional circumstances, the witness need not attend or testify at the hearing itself and shall not be summoned.²⁵⁹

A requirement that the person who is to preside at the hearing be present appears overly restrictive and unnecessary. I prefer Rules 10.01 to 10.03 of the College Discipline Committee's Rules of Procedure which also contemplate the videotaped examination of a witness before the hearing for the purpose of having the witness' testimony available to be tendered as evidence at the hearing. These rules anticipate that the discipline committee need not be present during the taking of evidence but can be later called upon to make relevant rulings. These provisions have seen little or no use in College disciplinary cases to date.

²⁵⁷ Section 18.3(2) of the *OEA*.

²⁵⁸ Section 18.3(3) of the *OEA*.

²⁵⁹ Section 18.3(4) and (5) of the *OEA*.

Recommendation 43: Taking of evidence before a hearing

43. Greater use should be made of Rules 10.01 to 10.03 of the Ontario College of Teachers Discipline Committee's Rules of Procedure. Use of these rules may permit the taking of evidence in a less forbidding surrounding and at a time and date more conducive to a witness' emotional well-being.

Conclusion

Throughout this section of the Report, I have referred to sections 18.2 to 18.6 of the *OEA*. They are designed to accommodate the best interests of young witnesses in a way which remains consistent with the interests of the adverse party. As is appropriate, they generally balance these competing interests in a way that is more accommodating to these witnesses than the criminal rules. While I recognize that these provisions may not be regarded by administrative tribunals, most particularly arbitration boards, as binding, I see no reason why disciplinary committees and arbitration boards should not adopt and utilize these provisions to full effect. My review leads me to conclude that these provisions are, at times, overlooked. Though I have recommended some refinements to the relevant legislation and to the rules of procedure that exist, I respectfully urge administrative tribunals (and equally important, counsel who rely upon these young witnesses) to consider and, where appropriate, apply the existing provisions of the *OEA*.

Recommendation No 44: Use of Sections 18.2 to 18.6 of the Ontario Evidence Act

44. Generally, sections 18.2 to 18.6 of the *Ontario Evidence Act* appropriately accommodate the best interests of young witnesses in a way which remains consistent with the interests of the adverse party. These provisions are, at times, overlooked. Ontario College of Teachers Discipline Committees and arbitration boards under the *Labour Relations Act*, 1995 should fully utilize these provisions in appropriate cases.

The theme of this section has been the greater accommodation which can be shown to young witnesses and sexual complainants who are required

to testify in administrative proceedings. This theme finds additional support in recent judgments of the Supreme Court of Canada which address the production of therapeutic and other private records of complainants or witnesses in both criminal and civil cases.

In *R. v. Mills*,²⁶⁰ the Supreme Court of Canada upheld the constitutionality of sections 278.1 to 278.91 of the *Criminal Code*, which regulate the production of private records of a complainant or witness to an accused charged with sexual offences. In doing so, the Court reflected that, in adopting these provisions, Parliament sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of the production of personal information on the efficacy of therapeutic treatment for victims of sexual violence, and to reconcile the rights of complainants and the accused. Ultimately, the Court approved a legislative framework that gives substantial recognition to the preservation of a complainant or witness' privacy and equality rights, to the point that production may not be necessary in the interests of justice, even where evidence has likely relevance to the defence.²⁶¹

In *M.(A.) v. Ryan*,²⁶² the Court addressed the production of therapeutic records in a civil action for damages allegedly caused by sexual assault. In articulating how the common law doctrine of privilege should be interpreted so as to regulate production of such records, the Court noted that the balance between competing interests may be differently struck in civil and criminal cases: "documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production".

These judgments not only speak to how administrative tribunals should deal with the production of confidential records pertaining to a student complainant or witness, but also to the appropriate balance that should be struck in such proceedings. Otherwise, students may be doubly victimized,

²⁶⁰ (1999), 139 C.C.C. (3d) 321 (S.C.C.).

²⁶¹ Clearly, the accused's rights must prevail where the lack of disclosure or production of a record would render him *unable* to make full answer and defence.

²⁶² [1997] 1 S.C.R. 157.

first by sexual abuse or harassment and then by the price he or she must pay in the legal proceedings that follow.

In *Mills*, the Court highlighted the speculative myths, stereotypes and generalized assumptions that arise in the context of requests for production of therapeutic records. Some of these are further addressed in the section of the Report that follows.

iii) Speculative Myths, Stereotypes and Generalized Assumptions

Overview

Elsewhere in this Report, I have noted some of the speculative myths, stereotypes and generalized assumptions surrounding children, sexual complainants and sexual misconduct which have been identified. The perpetuation of these stereotypes significantly impacts upon the identification and prevention of sexual misconduct in several ways. They may skew the investigative process and lead to an unwarranted conclusion as to the validity of a complaint. Similarly, they may distort the adjudicative process itself. Where a student alleges sexual misconduct by a teacher, it is therefore important that these stereotypes be recognized by those who may receive complaints, investigate them, and evaluate them: teachers, principals, supervisors, children's aid workers, police, counsel, judges and adjudicators. It is also important that these stereotypes be recognized by fellow students, family and friends, and the community at large.

Some of these stereotypes have been addressed through judicial or legislative intervention. This section of the Report is designed to highlight these stereotypes, so that they can be avoided, and assess the adequacy of existing procedures in administrative proceedings to address them.

Myths and Stereotypes

Myth no. 1: Children and their accounts of sexual abuse are inherently unreliable.

The *Criminal Code* and the *Ontario Evidence Act* have specifically removed prior requirements that the evidence of children, whether or not sworn, and sexual complainants be corroborated in order to be relied upon or that mandatory directions that it is dangerous to act upon their uncorroborated evidence be given.²⁶³ Of course, the presence or absence of corroborative evidence may be relevant to the assessment of any witness. The removal of statutory provisions that these witnesses need to be corroborated or need to be the subject of a caution recognizes that they are not presumptively unreliable but should be evaluated on the basis of the strength or weakness of their evidence in each case.

In criminal proceedings, witnesses generally take an oath or make a solemn affirmation before testifying.²⁶⁴ Where the proposed witness is under 14 years of age, the court, before permitting the person to testify, must conduct an inquiry to determine two things: (1) whether the person understands the nature of an oath or a solemn declaration; and (2) whether the person is able to communicate the evidence.²⁶⁵ An understanding of the nature of an oath or solemn affirmation involves some appreciation of an added responsibility to tell the truth in court and the practical and moral implications of telling a lie in court.²⁶⁶ The capacity to communicate the evidence involves the witness' capacity to have observed the material events, to recollect those events and to communicate what he or she remembers.²⁶⁷ The latter has been said to involve some capacity to relate the contentious parts of his or her

²⁶³ Section 274 of the *Criminal Code*; Section 18.2 of the *Ontario Evidence Act*.

²⁶⁴ Sections 13, 14 and 16(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, as amended.

²⁶⁵ Section 16(1) of the *Canada Evidence Act*.

²⁶⁶ *R. v. L.(J.)* (1990), 54 C.C.C. (3d) 225 (Ont.C.A.).

²⁶⁷ *R. v. Marquard* (1993), 85 C.C.C. (3d) 193 (S.C.C.).

evidence with some independence and not entirely in response to suggestive questions.²⁶⁸

Where neither test is satisfied, the person shall not testify.²⁶⁹ However, where the young person is able to communicate the evidence, but does not understand the nature of an oath or solemn affirmation, he or she may testify on promising to tell the truth, provided that the young person understands what it means to tell the truth.²⁷⁰

In contrast, the *OEA* does not mandate an inquiry to be held. Instead, where the competence of a proposed witness who is under 14 is *challenged*, the court or tribunal may admit the person's evidence if:

- (1) the young person is able to communicate the evidence, understands the nature of an oath or solemn affirmation, and testifies under oath or solemn affirmation;²⁷¹ or
- (2) the young person is able to communicate the evidence, understands what it means to tell the truth and promises to tell the truth, even though the young person does not understand the nature of an oath or solemn affirmation;²⁷² or
- (3) the young person can communicate the evidence and the court/tribunal is of the opinion that his or her evidence is "sufficiently reliable", even though he or she understands neither the nature of an oath or solemn affirmation, nor what it means to tell the truth.²⁷³

²⁶⁸ *R. v. Caron* (1994), 94 C.C.C. (3d) 466 (Ont. C.A.).

²⁶⁹ Section 16(4) of the *Canada Evidence Act*.

²⁷⁰ Section 16(3) of the *Canada Evidence Act*.

²⁷¹ Section 18.1(1) of the *OEA*.

²⁷² Section 18.1(2) of the *OEA*.

²⁷³ Section 18.1(3) of the *OEA*. Section 48(12)(d) of the *LRA* confers authority upon an arbitration board to "compel [witnesses] to give oral or written evidence on oath in the same

These provisions are more generous to the child witness than section 16 of the *Canada Evidence Act* in two significant respects. First, there is no presumption of incompetence in respect of children under 14. Second, a child's evidence may be admissible under section 18.1, even in the absence of an understanding by the child of what it means to tell the truth.

A consultation paper recently released²⁷⁴ by the Department of Justice entitled *Child Victims and the Criminal Justice System*, raises the issue of whether the presumption of incompetence in criminal proceedings should continue to apply to persons under the age of 14. The paper advances the proposition that the current competency test, and its interpretation by the courts, appear to add unnecessary complexity to the trial process, to compound the trauma experienced by a child witness, and to perpetuate the stigma attached to evidence that is unsworn or given on a promise to tell the truth. Given the current examination of this issue taking place, which extends well beyond the teacher-student context, I do not express any views on this question, except to say that the conduct of non-criminal proceedings should be guided by the approach articulated in the *OEA*.

Myth no. 2: A student's allegation of sexual misconduct by a teacher is unreliable unless he or she made a complaint or disclosure shortly after the event.

Generally, evidence of a prior statement made by a witness which is consistent with his or her testimony is inadmissible in criminal proceedings.²⁷⁵ The doctrine of "recent complaint" historically operated as an exception to that rule. It permitted the prosecution to adduce evidence of the details of a "recent complaint" made by a sexual complainant to support that complainant's credibility as a witness. It was said that a recent complaint was consistent with the witness' allegation because it reflected what one would expect of a victim who had truly been sexually abused. The corollary was that

manner as a court of record in civil cases". The provisions of the *OEA* apply to civil cases.

²⁷⁴ The consultation paper was released on November 29, 1999.

²⁷⁵ There are exceptions to this general rule which need not be addressed here: see *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont.C.A.).

a judge was obligated to instruct a jury that an adverse inference could be drawn against a sexual complainant who did not make a recent complaint.

The importance to any complainant's credibility of the absence of a timely complaint should vary from case to case. However, the significance of a complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based on now-rejected stereotypical assumptions of how people, particularly young people, react to being sexually abused.²⁷⁶ The doctrine of recent complaint was flawed because it presumed that truthful sexual complainants (including children) would make timely complaints about their abuse and, further, placed this burden upon sexual complainants only. Section 275 of the *Criminal Code* has abrogated the doctrine of recent complaint. As a result, the significance of a failure to make a timely complaint is to be assessed on a case-by-case basis, whether the complaint involves a sexual offence or any other crime.²⁷⁷

Though there is no statutory recognition in non-criminal proceedings that the doctrine of recent complaint has been abrogated, persons or administrative tribunals that receive, investigate or evaluate complaints of sexual misconduct should also avoid stereotypical assumptions as to how a person would be expected to complain about sexual misconduct. As noted, the failure to make a timely or complete disclosure may be relevant in the particular circumstances of a given case. Put simply, rejection of stereotypical notions about how sexual misconduct will be reported or disclosed cannot be replaced with equally misguided notions that all true victims of sexual misconduct will delay or provide incremental disclosure.

Myth no. 3: A student's allegation of sexual misconduct by a teacher is unreliable if he or she has previously been involved in sexual activity.

Section 276 of the *Criminal Code* provides that in proceedings respecting certain offences, including sexual interference, sexual exploitation, invitation to sexual touching, indecent act or sexual exposure, or any form of sexual assault, evidence that a complainant has engaged in sexual activity,

²⁷⁶ *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont.C.A.); *R. v. W.(R.)* (1992), 74 C.C.C. (3d) 134 (S.C.C.); *R. v. F.(J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont.C.A.).

²⁷⁷ *R. v. M. (T.E.)* (1996), 110 C.C.C. (3d) 179 (Alta. C.A.).

whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject-matter of the charge or is less worthy of belief.²⁷⁸

No evidence may be adduced by or on behalf of the accused that the complainant was engaged in such sexual activity (other than the activity which forms the subject matter of the charge) unless the court determines, in accordance with procedures set out in the *Code*, that the evidence is of specific instances of sexual activity, is relevant to a trial issue and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.²⁷⁹ In determining whether the evidence satisfies these criteria, the court must take into account a variety of factors, such as the right of the accused to make a full answer and defence; society's interest in encouraging the reporting of sexual assault offences; whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; the need to remove from the fact-finding process any discriminatory belief or bias; the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; the potential prejudice to the complainant's personal dignity and right of privacy; and the right of the complainant and of every individual to personal security and to the full protection and benefit of the law.²⁸⁰

Sections 276.1 to 276.3 of the *Code* establish the governing procedures for an application to adduce such evidence, including limits upon publication of the content of such an application.²⁸¹

Section 277 of the *Code* provides that for proceedings respecting these same offences, evidence of sexual *reputation*, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

²⁷⁸ Section 276(1) of the *Criminal Code*.

²⁷⁹ Section 276(2) of the *Criminal Code*.

²⁸⁰ Section 276(3) of the *Criminal Code*.

²⁸¹ The constitutionality of some of these provisions is currently before Supreme Court of Canada in *R. v. Darrach*, [1998] S.C.C.A. No. 184 (QL).

These provisions are designed, in part, to prevent stereotypical myths from forming the basis of the reception of categories of evidence which directly engage the privacy rights of complainants.

No similar procedures regulate the introduction of such evidence in administrative proceedings. Misuse of a witness' sexual history or reputation arises less frequently in the cases under consideration in this Report, in part, given the usual age of the complainants at the material time and the unavailability of a consent defence in most cases. However, the issue does sometimes arise, particularly where a former student's complaint is much-delayed.

It is important that investigators and adjudicators understand the stereotypical inferences to be avoided here. However, beyond an enhanced understanding of these stereotypes, there is a need for procedural rules to be adopted for administrative tribunals which are analogous to the criminal rules. Such procedural rules are designed not only to ensure that these stereotypes do not infect the fact-finding process, but that evidence of prior sexual activity be vetted in a way which is respectful of the personal dignity and privacy interests of the witness. The existence of these procedures is also designed to promote the societal interest in encouraging the reporting of sexual misconduct. In other words, even if arbitrators or discipline committees would be predisposed, in their discretion, to adopt appropriate procedures for vetting such evidence in particular cases, there is an important societal value in having these procedures in existence and known to be in existence.

Recommendation 45: Evidence of other sexual activity of witnesses in non-criminal proceedings

45.1 The *Ontario Evidence Act* and the Rules of Procedure of the Discipline Committee of the Ontario College of Teachers should be amended to specifically address the admissibility of evidence of sexual activity of a witness (other than that which is the subject matter of the proceedings) and the procedures which govern an application to tender such evidence. Arbitration boards acting pursuant to the *Labour Relations Act*, 1995 should also be guided by these evidentiary and procedural rules.

45.2 These evidentiary and procedural rules should be analogous to sections 276 to 276.3 and 277 of the *Criminal Code*. Nonetheless, it

should be recognized that the determination of admissibility in administrative proceedings may appropriately reflect differences in the issues and interests at stake in those proceedings.

Myth no. 4: All teachers who sexually abuse young children are pedophiles. Put another way, teachers found not to be pedophiles could not have sexually abused their young students.

Myth no. 5: Teachers only sexually abuse children in seclusion.

Myth no. 6: The psychological and emotional trauma associated with sexual abuse is absent where less physically intrusive abuse is involved.

Each of these stereotypical assumptions has been addressed earlier in this Report, in the context both of the DeLuca affair and other cases of sexual misconduct by teachers. Again, the objective here is to identify and thereby avoid assumptions which may not be borne out in individual cases. The objective is not to replace these stereotypes with equally rigid assumptions.

V

AVOIDING FALSE ACCUSATIONS

Introduction

My mandate is designed to facilitate the identification and prevention of sexual misconduct by teachers. Its prime focus must inevitably be upon the relatively small, though significant, number of educators who sexually mistreat students. However, this focus cannot blind me to the concerns raised by teachers about false accusations of sexual impropriety which were articulated during this review by teachers' unions and their legal counsel. I have been mindful of these concerns throughout this Report.

Teachers' concerns, however, are not confined to false accusations. Education and training of teachers, financial resources, enhancing the school environment, and sexual harassment policies are some of the topics they have raised. This chapter should not be regarded as the only recognition of the teacher's perspective or even as the only reflection of concerns about false accusations. On the contrary, my recommendations as to the law and as to policies and protocols are designed to promote child safety, but not at the expense of fairness to teachers. This chapter draws together some of the themes reflected at other places in the Report and which deserve special attention here. Some repetition is inevitable.

A. Articulating Concerns about False Accusations

Educators do not want sexual offenders in their midst. Indeed, the vast majority welcome measures that would truly identify and prevent sexual misconduct in the schools. However, they are concerned about false accusations of sexual impropriety and the effect of those accusations, even where proven unfounded, upon the reputation of affected teachers. Equally important, they are concerned about the impact that a heightened (some would say, undue) sensitivity to potential sexual misconduct might have on a

friendly and nurturing school environment. Further, they contend that conduct is too easily characterized as sexual, and inappropriate behaviour, which may be deserving of a reprimand, too easily characterized as criminal.

These concerns, it is said, are presently manifested in various ways. Fear causes some teachers to avoid the most innocent physical contact with students. After-hour activities with students are sometimes curtailed. Some teachers will never meet with a student alone. Classroom doors are kept open during any such meetings that do take place. A culture of over-reporting complaints which are either groundless or do not involve criminality may result in children's aid societies and police officers being brought in to address unclear boundary issues, or frivolous or ill-motivated complaints rather than true crimes.

Several teachers' representatives drew my attention to a recent article in the *Globe and Mail*, "J'accuse: A teacher's worst nightmare".¹ A male teacher in Northern Quebec charged with improperly touching a student's shoulder and knee is profiled. The teacher, whose criminal case remains outstanding, and representatives of teachers' associations are interviewed. The concerns expressed by them are representative of those that have been expressed to me during this review:

- allegations of sexual impropriety in the classroom are ruining teachers' lives;
- teaching is now a high-risk job; for a man, being a teacher "is playing with fire".
- fears of sexual allegations are believed to be a factor behind the sharp decline in the number of men training for primary-school teaching in England and, by implication, here;
- after grade five girls admitted that they had fabricated a story against a Nova Scotia gym teacher, he asked to be moved to another school despite being cleared. "Everybody remembers the allegation, as opposed to what actually happened. For a teacher, who is held in a high

¹ Ingrid Peritz, *Globe and Mail* (January 29, 2000).

level of trust, the allegation is as damaging as the charge itself'.

- students can misinterpret day-to-day gestures such as when teachers comfort an upset pupil. As a result, male teachers in particular avoid any physical contact. They typically leave the office door open when meeting with a female student. Others refuse to meet after class without another teacher present.
- a wave of unfounded sexual allegations has created a climate of paranoia among teachers in the schools.

The article concludes:

Mr. Paquette [a union executive] wants stricter guidelines that will ferret out real aggressors but protect the innocent. He proposes videotaping pupils immediately when they file their accusations, to prevent any changes in their story.

"Students have to understand that what they're doing is serious. They're capable of crying wolf", he said. "Look, we don't want pedophiles in the system either. But we're destroying innocent people too."

B. Quantifying False Accusations

There is no means of quantifying the number of false accusations of sexual impropriety made against teachers or, indeed, the percentage of complaints of sexual impropriety that are false. As reflected immediately above, some suggest that the numbers and percentages of unfounded complaints are high. I was directed to a number of cases in which criminal charges were withdrawn against teachers or where acquittals resulted. Illustrations of complaints which were regarded as unsubstantiated or unfounded by police or school boards were also provided.²

² In fairness to the affected parties, I undertook not to disclose the names of the files reviewed.

Diametrically opposed views on the prevalence of false complaints were also presented. Some literature suggests that the incidence of false accusations of sexual abuse made by children is extremely small. This is said to be particularly so for very young children. Some suggest that children virtually never lie about their own sexual victimization. The proponents of this view reflect that unsubstantiated or unproven sexual offences are indicative of the difficulties of proving sexual offences to the criminal standard of proof and do not permit an inference that false complaints are numerous. They distinguish between unsubstantiated or unproven complaints, on the one hand, and totally unfounded complaints on the other.

I am unable to conclude that there is a plethora of false accusations of sexual impropriety made against teachers. In particular, I am unable to conclude that young children routinely or commonly lie about sexual abuse. Nor can I conclude that false accusations are extremely rare. However, this debate is beside the point. False complaints are made against teachers. These may represent a deliberately false accusation or a misinterpretation of a teacher's conduct. They do occur.³

Similarly, I am unable to determine the extent of any over-reporting of sexual complaints in Ontario to children's aid societies or to the police. However, this again, is beside the point. Sometimes, matters are reported to children's aid societies or to the police which, upon a correct understanding of the law, were not reportable, either because there was no factual basis to do so or because the complaints, even if true, were disciplinary and not criminal matters.

³ Another debate, discussed in Chapter III, needs to be revisited here. Some suggest that the DeLuca case is an isolated event and that virtually no teachers engage in sexual misconduct against their students. They tie this argument to the prevalence of false accusations. In my view, even if false accusations were prevalent, it would not follow that DeLuca is an isolated case and that the vast majority of sexual complaints must be unfounded. Indeed, I am completely satisfied that the DeLuca case is not isolated and that there are a significant number of cases in which Ontario teachers have engaged in sexual misconduct. The cases in which teachers have entered pleas of guilt, have been found guilty or have been disciplined demonstrate the point. That does not assist in quantifying the extent or prevalence of false accusations; it only demonstrates that the problem is significant enough to be addressed through enhanced policies, protocols and legislation.

Having rejected the stereotypical notion that children are inherently unreliable, I would not substitute the equally untenable proposition that children are incapable of lying or misinterpreting events. Once one recognizes that false complaints of sexual impropriety do occur, in whatever number, the issue must be addressed. Such complaints can be devastating to an accused person, and the stigma associated with the complaint may linger, regardless of its disposition. A false complaint may affect the teacher's reputation and ability to teach again, certainly at the same school. It may even destroy the teacher's motivation to continue teaching and effectively end his or her career.

The investigation and evaluation of sexual complaints must make the best interests of children paramount. However, the serious impact of false complaints compels an approach to such complaints which remains open-minded and fair in all respects. Each case should be evaluated on its own merits, devoid of stereotypical notions about the parties or about sexual misconduct itself.

C. Innocence Lost

In a society where sexual abuse is all too common and where there is a heightened awareness of its prevalence, it is not surprising that educators, and other professionals who work with young persons, may alter the ways in which they interrelate with children, sometimes to the detriment of those children. Many fear that a hug for a troubled child or a pat on the back for a job well done or physical contact incidental to hands-on school activities may expose them to allegations of abuse and, therefore, are frequently avoided. Special education children may have needs that are more difficult to accommodate in a more inhibited environment. Ultimately, it is said that children end up learning in a less friendly and less nurturing environment.

Schools must, of course, strive to provide a safe, warm and nurturing environment for their students. Rules prohibiting any physical contact whatsoever between teachers and students under any circumstances go too far and are patently unwise. The distinction between appropriate and inappropriate touching, between acceptable and unacceptable behaviour, ought to be made clear.⁴ A hug for a troubled child or a pat on the back for

⁴ As reflected elsewhere, the education of teachers should not be confined to strategies on avoiding false accusations but should predominantly focus on what is and is not acceptable

a job well done are not examples of sexual misconduct. To deal with these concerns, I think it important that schools initiate programs to educate and train teachers, parents and students about these boundary issues so as to create a mutual understanding of the difference between committing sexual improprieties and being a compassionate professional teacher. A recommendation to this effect is put forth in Chapter VI.

Some false complaints are, of course, inevitable. However, teachers are not rendered immune from such complaints by withdrawing from their students and focussing on the possibility of false allegations. Teachers do not want that, nor do students. If teachers perceive that a system is in place which fairly addresses those complaints, I expect they would be less likely to be unduly inhibited in their appropriate interchanges with students.

I have referred to the need for open-mindedness in the investigation and evaluation of sexual complaints. Students need to feel that they will be heard, that their accounts will not be discounted or minimized solely because they are students and the alleged offender is a teacher. Teachers also need to feel that they will be heard and that complaints will not be accepted just because they are made by children. The concerns expressed by students have been addressed in Chapter VI. Here, I suggest several recommendations to further address the concerns expressed by teachers.

D. The Relationship between Children's Aid Societies and Teachers

There appears to be a level of distrust between some children's aid workers and counsel for suspected teachers. Counsel for teachers claim that children's aid workers are often inexperienced, inevitably favour the evidence of children and uncritically evaluate their accounts; that children's aid societies too easily embark on investigations coloured by their preconceptions; and that even where teachers are invited to provide their response to children's aid societies, they are often kept in the dark as to what has been said about them. They say they are caught in a "catch 22", not being able to respond to undisclosed allegations but knowing that guilt may be inferred from a refusal to respond. Indeed, some defence counsel prefer that children's aid societies always involve the police in their investigations, given their greater objectivity

in the evaluation of complaints. Finally, counsel state that some children's aid workers put suggestive questions to students and otherwise conduct interviews in ways which detract from students' accuracy and reliability. I did not interpret any of these comments to be uniformly applicable to all children's aid societies or workers, but to reflect undesirable practices which, it is said, have been observed.

Children's aid societies, on the other hand, have a very different perspective on these matters. They suggest that they appropriately place the best interests of children first and are well-positioned to evaluate claims of abuse. They are mindful of the interviewing techniques which enhance or detract from reliability and are trained in this regard. Some express concern that premature exchange of information with the suspected teacher or his or her counsel may impede the investigation and may cause student complainants within the school to be easily maligned or humiliated, as indiscrete inquiries are initiated in the school by the defence. Finally, some maintain that teachers' unions thwart investigations by delaying the investigative process (and the disciplinary process) by causing teachers (all of whom are members of the same union as the accused teacher) to close ranks and not cooperate in the investigation. Again, I did not interpret these comments to be uniformly applicable to all unions or their counsel, but to reflect problems that are said to have arisen in specific cases.

My mandate did not permit a close examination of either the criticisms of the investigative process by children's aid societies or the criticisms directed against the teacher's unions. Nonetheless, certain obvious conclusions can be drawn.

There appears to be a level of suspicion between some teachers' unions and children's aid societies that is inconsistent with the ability of each to perform their respective jobs to their fullest potential. This level of suspicion is not confined to the relationship between teachers' lawyers and children's aid societies but may represent a broader level of distrust between children's aid investigators and the defence bar generally. Some of this tension is inevitable, given their respective responsibilities. However, there is much room for improvement. Everyone involved in our educational system has an interest in protecting students.

Though I have not evaluated the adequacy of training in these areas, it seems obvious that further education and training, particularly in some of

the areas identified here, can promote a transparent and fair process for evaluating sexual complaints. Joint educational programming has proven to be a success in other areas where levels of misunderstanding exist.

Recommendations 46 to 47: Educational programs

46. All children's aid society workers assigned to investigate sexual abuse at schools should be experienced and well-trained in the techniques which enhance the reliability of witness statements and those that detract from their reliability.

47.1 The Ministry of the Attorney General and the Ministry of Education should establish some joint educational programming for children's aid societies, teachers' associations and their counsel and other appropriate stakeholders on the investigation and evaluation of sexual misconduct cases to enhance understanding of the issues and reduce barriers and promote trust and understanding between the parties.

47.2 Such educational programming should address, among other things, the exchange of information between investigators and counsel for the suspected party during the investigative stages.

47.3 The Government of Ontario should provide funding assistance to enable this programming.

E. Concerns about Over-reporting

In Chapter VI, I discuss section 72 of the *Child and Family Services Act*, which imposes a statutory requirement to report suspicions of sexual abuse to a children's aid society forthwith, where reasonable grounds for those suspicions exist.

Some argue that the relatively low threshold for reporting, and the fear that educators will be prosecuted for failing to report, results in a “culture of over-reporting” and an abdication of the exercise of any discretion to screen out patently frivolous complaints or to independently assess whether the conduct complained of is truly reportable.

Section 72 is designed, of course, to provide a moral and legal incentive to early reporting of suspected child abuse which, in turn, makes it more likely that such abuse will be identified early and ended. The legislation is intended to put the best interests of the child first. A standard of "reasonable grounds to suspect", a requirement that reporting be done "forthwith" and that there need only be reasonable grounds to suspect that "there is a risk" of future sexual abuse all support an approach that favours early, outside intervention. Further, putting children's safety first necessarily means that there will be cases reported to a children's aid society that ultimately, after investigation, will not warrant criminal or disciplinary proceedings. This is inevitable. However, as earlier expressed, it is my view, that section 72 does allow limited scope for some preliminary evaluation by the school before a report is made.

A report is not mandated upon mere suspicion or conjecture but upon *reasonable grounds* to suspect. *Reasonable grounds* imports some objective and articulable basis for one's suspicions. Put succinctly, while the threshold is a low one, it does not compel the automatic reporting of any information communicated, regardless of its ambiguity or patent falsehood. Similarly, the requirement that suspicions be reported *forthwith* leaves some scope, albeit limited, for some preliminary evaluation. Finally, section 72 was never intended to impose a reporting requirement for all sexual misconduct by teachers, but only for conduct which can properly be characterized as abuse.

This accords with an underlying purpose of the legislation, to ensure that children in need of protection by children's aid societies receive it through early intervention. This also recognizes that well-trained school officials, principals and the Ontario College of Teachers should be well-situated to address other kinds of sexual misconduct in the employment or disciplinary context.

Recommendation 48: Education as to reporting requirement

48. An appropriate understanding of the jurisdiction and role of children's aid societies and the reporting requirement represents one means of minimizing potential over-reporting of sexual complaints and the harm which over-reporting may cause. Further education and training of educators and children's aid societies as to the meaning and use of section 72 of the *Child and Family Services Act* is desirable.



VI

POLICIES AND PROTOCOLS

A. Introduction

In Chapter IV, I examined the existing laws that define and sanction sexual misconduct by teachers and that impose duties upon school boards, fellow teachers, principals and supervisory officers to address known or suspected misconduct. Some deficiencies in existing laws caused me to make certain recommendations for change. Conduct may also be guided by policies, procedures, guidelines or protocols.¹ Though policies and protocols may not be binding in law, they represent important tools for the prevention and early identification of sexual misconduct, and for protecting those already victimized by such misconduct.

A policy on how complaints of sexual abuse should be acted upon that is clear, fair and known to all is likely to help protect children, ensure fairness to the affected teacher, provide assurance to the community and enhance the school environment. The absence of such a policy often produces uneven or inappropriate treatment of students and teachers, unnecessary uncertainty, speculation, gossip and innuendo, heightened trauma to the interested parties,

¹ The Toronto District School Board distinguishes between these terms in this way: A *policy* is a statement adopted by the board that provides the framework for a course of action consistent with the board's mission and values; a commitment by which the board is held accountable. A *procedure* is a prescribed course of action, emanating from board policy, that must be taken in a given situation and which is consistent with the board's mission and values. A *guideline* is a recommended course of action that may be taken in a given situation and which is consistent with the board's mission and values and policies. A *protocol* is a procedure which sets out rules for the interaction between the board and outside agencies. I find that these terms are often used interchangeably and the distinctions easily blurred. For convenience, I often use the phrase "policies and protocols" to describe them all. The Toronto District School Board's definitions are useful in emphasizing the various types of matters that need be addressed in establishing comprehensive "policies and protocols".

particularly children and, overall, a process that is seen to be arbitrary and unfair.

Accordingly, this chapter focuses on existing and recommended policies and protocols for school boards across Ontario.

To facilitate this review and gain some understanding of today's response to teacher-student sexual misconduct, questionnaires and/or requests for submissions were sent to all Ontario school boards, children's aid societies, 17 of the province's larger police forces, and other stakeholders, all of whom are listed in Appendix C. The protection of students in schools is a responsibility not only of educators but also of many others, including police, children's aid societies, the legal system, parents and the community. In the questionnaires, reproduced at Appendix B, respondents were asked to provide statistics, where available, on the incidence of sexual misconduct, information about terminations, resignations or retirements relating to sexual misconduct, and information about any unfounded allegations against teachers or volunteers. They were asked to identify key issues and problem areas, and provide recommendations on how best to address these issues. In addition, they were asked to provide copies of their existing policies on teacher-student sexual abuse and harassment.

A significant number of school boards across Ontario responded to the questionnaires and provided me with their existing policies, together with their recommendations. These materials effectively portrayed the current state of affairs.

While certain procedures and protocols are obviously needed to reflect local circumstances and resources, the provisions of basic school board policies lack uniformity and are fragmented and uneven. It appears that school boards often act in isolation and have had limited opportunity to share or draw upon the experiences of other boards. Some boards exhibit high levels of awareness and initiative in dealing with sexual misconduct by teachers. Others demonstrate limited understanding or appreciation of the issues. Put simply, there is an absence of direction at the provincial level, which has contributed to a somewhat unsatisfactory state of affairs in some school districts.

A number of school boards have skeletal or no related policies in place. Some boards indicated that, with recent amalgamations, they are in the

process of developing policies. There are school boards, particularly small boards, that revealed that they lacked the resources to develop extensive policies. By way of contrast, some boards have obviously put considerable time and effort into policy development. These boards have protocols in place that address, sometimes in exemplary fashion, some of the issues raised in this Report. However, few boards have a comprehensive and complete set of policies.

In general, the balance of school board policies demonstrate various deficiencies. Sometimes, a policy on one subject is inconsistent with other policies of the same board. Some important topics are not dealt with adequately, or at all. For example, a number of school boards have policies on student misbehaviour but have no policies on teacher misbehaviour. Indeed, one or two boards that have a commendable range of policies addressing sexual abuse, have none in place regarding sexual misconduct by staff toward students. A sizeable number of boards acknowledged that they have no protocols on how to deal with complaints or disclosures of teacher sexual misconduct. Often, the boards with more extensive policies and protocols have already experienced high profile abuse cases involving their staff. Not surprisingly, as has been the case in Sault Ste. Marie, such cases focus attention on the problem and the need to address it.

Even where protocols exist, they may reflect existing law or important distinctions inadequately. Or, they show that different school boards hold different interpretations of legislation that has province-wide application. For example, a comparison of school board protocols demonstrates significant differences in interpretation on the duty to report suspected child abuse under the *Child and Family Services Act*² ("CFSAct"), and in the practices surrounding that duty. In some boards, the principal is to conduct a preliminary investigation, and decide whether or not to report. In other boards, a report must be made to the superintendent or the director of education before any action is taken. A few boards require automatic and immediate reporting to the police or the children's aid society ("CAS"), and specify that it is not the job of the board to investigate (although the board may conduct its own investigation at a later date). In Chapters IV and V, I discussed the interpretive issues surrounding the obligation to report under the CFSAct. This reporting obligation needs to be understood better and translated

² R.S.O. 1990, c. C.11, as amended.

accurately into board policy. Some of these policies should be updated, in any event, to reflect recent amendments to the Act that have been incorporated in this Report.

Another important example of differences in policy relates to whether a teacher suspected of sexual misconduct should be contacted before a report has been made to the police or a children's aid society. Most inter-agency protocols and some board policies emphasize that the suspected teacher should not be contacted until the school is directed by the police or the children's aid society to do so. One school board policy specifies that section 18(1)(b) of the *Teaching Profession Act*³ ("TPA") regulation does not apply to child abuse but is silent on sexual harassment and other non-criminal sexual misconduct. One policy requires that suspected school staff be informed of the situation before the police or the children's aid society are contacted.

The maintenance and retention of records concerning sexual misconduct complaints is another example of divergent school board policies that cannot be explained or justified by local circumstances or resources.

Having identified significant deficiencies and inconsistencies in existing policies and protocols, I have made recommendations for change. In doing so, I have drawn not only upon the responses from the questionnaires and the content of existing policies, but also from the oral and written submissions made to me by many interested parties. Through a consultative process, many of these parties also provided relevant materials for my consideration. I am especially grateful for the multiplicity of perspectives that they afforded me.

In addition, I have reviewed the research literature available in this area. The topic of sexual misconduct by teachers has been the subject of articles, official reports, and discussion papers, mostly generated outside Ontario. Though I am mindful of distinctions to be drawn between Ontario and other jurisdictions, I found that many of the issues, dilemmas and proposed solutions contained in these materials are applicable to the Ontario experience.

³ R.S.O. 1990, c. T.2, as amended.

This chapter contains specific recommendations on how to develop policies and protocols, including a checklist of topics which should or might be addressed. Some of the recommendations draw upon existing board policies. Though I recognize that some variation in protocols as between school boards may be dictated, for example, by differences in available resources or personnel, the major components of these policies and protocols should have uniform application throughout Ontario. After all, sexual abuse and harassment in Toronto also constitute sexual abuse and harassment in Thunder Bay, Windsor, Kapuskasing and L'Original.

The finest policies and protocols accomplish little unless they are adhered to in practice. This involves dissemination of the policies, education and training on their existence and meaning, and monitoring to ensure compliance. Several of my recommendations are designed to promote adherence to the policies and protocols in practice.

Similarly, the finest policies and protocols are less likely to be created, or if created, adhered to fully by individual school boards unless there is a recognition that sexual misconduct by teachers is a concern worth addressing. Chapter III speaks to that issue, as do the survey results.

Thirty-six of the boards surveyed were able to provide some information on teacher-student sexual misconduct.⁴ Some boards noted that amalgamations, lack of formal records and the turnover in administrative staff limited their ability to provide accurate reports of the numbers or characteristics of teacher sexual misconduct cases. Even so, survey responses disclosed that at least 49 staff members and volunteers from 15 different school boards have been dismissed for sexual misconduct involving students in the past nine-and-a-half years.

The boards that reported terminations for sexual misconduct represented every constituency within the school system: Catholic and public, large urban centres and small northern jurisdictions, and both French- and English-speaking schools. An additional 14 staff members were reported to have resigned or retired in circumstances where an allegation of sexual

⁴ Forty-one survey responses were received. Five respondents could not provide data on alleged sexual misconduct by teachers, due to the unavailability or inadequacy of relevant information. In terms of number of students, the responding boards represent over 50 per cent of the student body in Ontario.

misconduct was pending. One board reported asking a volunteer to leave for sexually harassing students. In summary, 39 school boards disclosed at least 64 cases that had to be addressed in the relevant period.⁵

The survey results demonstrate, predictably, that larger boards have more experience than most smaller boards in recognizing and dealing with the problem. Some school boards believe that sexual misconduct by school employees is not an issue in their jurisdiction and that they need not worry about it. Those boards expressed the belief that it does not occur in their schools and, should it occur, they would recognize it immediately.

Unfortunately, communities cannot be inoculated against the problem of sexual misconduct by remoteness, social class, size or religious beliefs. A complacent "it can't happen here" attitude might make undetected abuse almost inevitable. Such an attitude can colour how sexual misconduct complaints are viewed and evaluated and, thereby, place students at greater risk. Placing students at risk is particularly likely if such attitudes prevent or inhibit the development of preventative measures and protocols to address suspected cases. It follows that those boards that acknowledge a higher number of cases are not necessarily those that have the biggest problem. They may be boards that are open-minded and receptive to student disclosures, and more meticulous in their responses and record-keeping, because they recognize the significance of these events.

Recommendations 49 to 51: Policies and protocols throughout Ontario

49.1 Every school board in Ontario should establish and promote adherence to policies and protocols pertaining to sexual misconduct by teachers, other school staff and volunteers.

⁵ The school boards were also asked to provide tallies of unfounded cases, which were defined as allegations that had no basis in fact or that provided no reasonable grounds for suspecting that abuse or harassment had occurred. This question was limited to the last one and-a-half years (the post-amalgamation period). Notably, almost one-quarter of the responding boards (ten) were unable to answer this question because records were not kept in such way that this information was available. Well over half of the boards, 27 of the 41 responding, reported no unfounded allegations against teachers for sexual abuse or assault. In all, there were three instances involving teachers from three different boards. Five school boards reported a total of seven unfounded cases of sexual harassment against teachers. There were no reports of unfounded allegations made against school volunteers.

49.2. These policies and protocols should be designed to:

- (a) protect students from sexual abuse and harassment through policies that are calculated to prevent misconduct *before it occurs*;
- (b) promote the early identification of sexual misconduct, when it has occurred;
- (c) ensure that allegations of sexual misconduct are fairly investigated and evaluated;
- (d) protect students who have been victimized from further physical, psychological or emotional harm; and
- (e) recognize and complement applicable laws.

50. Given the shared responsibility and necessary interaction between school boards, children's aid societies and police for the reporting and investigation of sexual abuse allegedly engaged in by teachers, other school staff and volunteers, protocols should also be developed cooperatively between school boards, local police forces, and children's aid societies.

51. School board policies and protocols should be regularly reviewed and updated to reflect changes to existing laws or to accommodate improvements which flow from the implementation of these policies.

It is important to remember that policies and protocols designed to identify and prevent sexual misconduct by educators may, and indeed, should be established within larger initiatives designed to create a school environment free from violence, abuse, harassment and discrimination. These initiatives could address student-to-student or student-to-teacher activities as well as a wide range of conduct, including physical abuse or harassment unrelated to sexual misconduct. The policies and protocols recommended in this Report can be integrated with analogous policies. For example, boards might wish to implement a policy on sexual harassment and abuse that governs conduct both by educators and by students.

To help with the creation and improvement of school board policies and protocols, this chapter identifies problems that need to be addressed, and suggests some key components that should be included in such policies. It ends with a discussion of how school boards can go about creating their policies and protocols. As well, I have provided a detailed checklist of topics that should be considered. Finally, the appendices contain several existing school board policies and protocols that address, in different ways, a number of the issues identified here.

B. Problem Areas

Having recommended that every school board in Ontario establish and promote adherence to policies and protocols on sexual misconduct by teachers, other school staff and volunteers, it is important to highlight the problems that need to be addressed in these policies. In part, the problems have been identified through a detailed examination of the DeLuca case, other cases involving known or alleged teacher sexual misconduct, and through my prior examination of existing legislation. Not surprisingly, the various stakeholders have different, sometimes conflicting, perspectives both on what the problems are and how to solve them. The responses of school boards, children's aid societies and police forces to the surveys also helped identify problems. Without listing all of the concerns raised, I would focus on several problems that were prominent and whose solution may find expression in school board policies and protocols:

- **Defining Boundaries of Behaviour**

Certain conduct by teachers is well-recognized as improper and requires little elaboration. However, some parties reflected that uncertainties exist about the boundaries that divide appropriate and inappropriate behaviour. Some existing policies confuse sexual crimes and sexual harassment. Some educators continue to maintain misguided notions about sexual misconduct. In Chapter IV, I provided a definition and illustrations of sexual misconduct to be incorporated into the Code of Ethics of the Ontario College of Teachers (the "College") and school board policies.

- **Screening of Applicants for Teaching Positions**

There is general consensus that criminal record checks represent one appropriate way to screen applicants. The Ontario College of Teachers

mandates such checks before new teachers are certified. However, serious concerns have been expressed about the limited utility of criminal record checks since most teacher-offenders have no prior record, and given that checks are seldom made when a teacher transfers from one school to another. More importantly, various stakeholders contend - correctly in my view - that undue emphasis should not be placed upon a criminal record check to the exclusion of other means of screening applicants. The same principles apply to volunteers who work extensively with students.

- **Hiring practices, including reference checks with past employers**

Serious concerns have been raised about how complete the information sought from a teaching applicant is, and the extent to which references from past employers are checked. This is particularly a problem when teachers transfer from school to school within a board. Serious concerns have also been raised about the extent to which references fail to disclose important information, either due to their inadequate record-keeping or in misguided loyalty or compliance with the terms of a settlement that brought about the teacher's resignation.

- **Responding to Complaints**

Judgmental or hurtful responses to complainants, multiple interviews of students by various officials, and police investigations compromised by unskilled and misdirected internal investigations have also been raised as systemic problems. Inadequate education and training surrounding disclosure issues were frequently discussed.

- **Reporting Suspected Misconduct**

Many stakeholders saw the issues surrounding a teacher's obligation to report suspected misconduct as the most significant ones that need to be addressed by this review. School boards, children's aid societies and police described the reluctance of staff to report on their colleagues, confusion over the scope of the reporting obligation, misinterpretations of the applicable laws on when, and to whom, reporting must take place, and inconsistent board policies on the extent to which internal investigations should precede or follow reporting to children's aid societies or to the police. The inhibiting effect of section 18(1)(b) of the Regulation under the *TPA* upon the duty to

report was raised repeatedly. Teachers' associations expressed serious concerns about a culture of over-reporting, over-inclusive notions of what is reportable as abuse, and the risk of unfounded accusations initiated or pursued against teachers.

- **Duties to Students as Complainants**

Many stakeholders recognized that the re-victimization of students is a fundamental concern that needs to be addressed through ongoing support systems.

- **Documenting Complaints or Suspicions**

Divergent board policies on the maintenance and retention of records documenting complaints or suspicions of sexual misconduct raise concerns about whether these policies adequately protect children from offenders who move from school to school. Concerns about fairness to teachers seeking new employment were also raised.

- **Disclosure to the Ontario College of Teachers**

Various stakeholders expressed concern about the adequacy of the reporting obligation that school boards have to the Ontario College of Teachers for criminal convictions or other misconduct by teachers that, in the opinion of the board, warrant review by the College. In Chapter IV, I addressed this issue in some detail and I will revisit it in the context of policies and protocols.

- **Resignations**

There was much evidence presented to me by school boards, teachers' associations, and the College on how teacher resignations, while sexual misconduct allegations remain outstanding, are brought about through settlement between the parties. Though the settlement may avoid expensive and time-consuming litigation, and may rid the school board of a problem teacher, serious concerns have been raised about whether terms of settlement that limit or prevent a school board from commenting adversely upon the teacher when references are sought, put future students at risk.

None of these concerns, or others addressed in this chapter, are mere speculation. All are grounded in specific cases I reviewed.

C. Prevention Strategies

i) Overview

Prevention...means being proactive rather than reactive, digging for root causes and daring solutions rather than the proverbial "quick fix." As noted in the Badgley Report (1984), the sexual abuse of children points to a deeper malaise in our society that requires a fundamental shift in values. We need the courage and patience to confront these issues, to examine with painstaking honesty attitudes toward power, sexuality, women, and children, and to struggle to change ourselves and the communities around us. Otherwise, individuals, institutions and society at large will continue to support and reflect the very values that give rise to the problem in the first place, leaving little hope of eliminating the sexual exploitation of our children.⁶

My mandate requires me to make recommendations regarding policies, protocols and procedures to effectively *identify* and *prevent* sexual misconduct. Preventing sexual misconduct — stopping it before it occurs — is the best way to protect our students and the school environment. Accordingly, I address prevention strategies first.

Prevention strategies are twofold: (i) education and training on what constitutes sexual misconduct and how can it be identified and prevented; and (ii) ensuring, so far as is possible, that sexual perpetrators do not enter the profession and that, when discovered, they are not permitted to continue to teach or move from school to school. This strategy involves adherence to policies and protocols that ensure that new teachers or those seeking to transfer to another school, are fully screened. It requires prospective employers to have access to accurate and complete information about the

⁶ C. Stewart & N. Bala, *Understanding Criminal Prosecutions for Child Sexual Abuse: Bill C-15 and the Criminal Code: A Guide for Community Groups and Professionals* (Toronto: Institute for the Prevention of Child Abuse, 1988).

applicant. Both strategies are enhanced by clear and unequivocal policy statements that reflect no tolerance for sexual misconduct and that define the boundaries of acceptable behaviour.

ii) Education and Training

To combat sexual misconduct effectively, education and training needs to be directed to (i) prospective teachers; (ii) current teachers, volunteers and other school staff; and (iii) students and parents.

Prospective Teachers

It might be said that the general working assumption in preservice programs seems to be that people choose the teaching profession because they want to help young people, not harm them. That one does not abuse one's pupils or engage in sexual relations with them is thought to be self-evident and not a matter which requires a great deal of instructional attention. Indeed, it must be acknowledged that most teachers understand the boundaries that exist between teachers and their students. For this reason, the emphasis in teacher education programs has been on identifying and reporting the abuse of children and young people by parents, other caregivers or relatives.⁷

Earlier in this Report, I noted the protestations of disciplined or accused teachers that they had been inadequately trained on acceptable boundaries of behaviour. Though these protestations, at times, strain credibility, they do reinforce the importance of ensuring that there be no misunderstanding of the boundaries. Furthermore, although some activity is patently unlawful, other activity raises less clear boundary issues. While some activities might not constitute sexual misconduct, they may, nonetheless, be unacceptable. Undue familiarity or socializing with students is one example. This conduct may be inappropriate and incompatible with the role and perception of a teacher, notwithstanding that it is not intended to lead to a sexual relationship. Teachers, and particularly younger teachers in secondary

⁷ Submission by Rebecca Coulter, Associate Dean, Faculty of Education, University of Western Ontario.

grades, where the age disparity between students and some teachers narrows, must be alert to this boundary issue.

Educating and training prospective teachers delivers the right message at the right time. It also ensures that students in faculties of education, who are trained through placement in schools as assistants, understand what conduct is acceptable *before* children are entrusted to their care.

There are 11 teacher education programs in Ontario offered through ten universities. Teacher education programs in Ontario are either concurrent (where students work on an undergraduate degree and a Bachelor of Education at the same time) or consecutive (where students first complete an undergraduate degree and then enrol in the Bachelor of Education program). A small number of student teachers involved in technological studies enter a limited number of faculties of education directly from the work force, and may ultimately earn a diploma in education. In all instances, the programs consist of university course work and a practice component. In addition to these pre-service programs, faculties of education play a role in the continuing education of experienced teachers.

For the most part, each faculty of education develops its own program of studies, subject to approval by university governing bodies. Some direction is provided through a regulation⁸ under the *Ontario College of Teachers Act, 1996*⁹ ("OCTA") that requires instruction on the existing education-related statutes and regulations. More recently, the Ontario College of Teachers has become involved through the accreditation of faculties of education.

The fact that the instruction of student teachers occurs in two environments, the on-campus classroom and the school-based practicum, is an important point to understand when deciding on how best to educate student teachers about child abuse and about their responsibilities as professionals. Indeed, research indicates that pre-service students are

⁸ O. Reg. 184/97.

⁹ S.O. 1996, c. 12, as amended.

considerably more responsive to and more easily influenced by their associate teachers in the school practicum than by other instructors in their program.¹⁰

There is considerable variation, and autonomy, in what, where and how much instruction is given to student teachers in Ontario regarding educator sexual misconduct. Some programs are better than others. Despite the strides made on this subject in recent years, it is clear that not all programs address the full range of issues that needs to be taught. Many interested parties supported recommendations designed to ensure that prospective teachers are well-educated and trained on matters relating to sexual misconduct in the school setting.

Since this Report contemplates the creation of a Code of Ethics by the Ontario College of Teachers, and school board policies and protocols across Ontario that, in large measure, reflect province-wide standards, it follows that the Code of Ethics and province-wide policies and protocols should form an important component of the education and training process.

Recommendations 52 to 55: Education of prospective teachers

52.1 Students at faculties of education should be fully educated on sexual abuse and harassment policies and protocols, and on their professional and ethical duties and obligations, including the protection of students through the reporting of known or suspected sexual misconduct.

52.2 Education and training should be provided on these and other appropriate subjects:

- (a) what constitutes teacher sexual misconduct.**
Instruction should define and illustrate sexual abuse, harassment and other offensive conduct of a sexual nature that may affect the physical integrity or security of a student or the school environment;

¹⁰ The terminology used to describe the practising classroom teacher who assumes responsibility for supervising student teachers varies from institution to institution. Terms to describe this position include associate teacher, co-operating teacher and adjunct professor. Students learning to be teachers are also variously called student teachers, teacher candidates or novice teachers.

- (b) the appropriate and acceptable boundaries between teacher and student. Illustrations and case situations should be provided;
- (c) the scope and nature of a teacher's duty to report sexual abuse under the *Child and Family Services Act* and the duty to protect students from other forms of sexual misconduct. Instruction should address the issues surrounding reporting that have been discussed in this Report;
- (d) recognition of the early warning signs of sexual misconduct;
- (e) how to respond sensitively and appropriately to a student's disclosure of sexual misconduct, and how to address confidentiality concerns;
- (f) protecting a student complainant from further potential harm;
- (g) documenting disclosures;
- (h) the procedures that follow initial disclosure, including those applicable to a teacher suspected of misconduct;
- (i) the avoidance of stereotypical notions about sexual misconduct, its perpetrators and its victims.

53. The subject of sexual misconduct can be integrated with education and training on analogous subjects, such as physical abuse. However, sexual misconduct should form an important part of a compulsory foundation course of study at all faculties of education.

54. Faculties of education should evaluate the ways they deal with the subjects of sexual misconduct, physical abuse, professional ethics, and the duties and obligations of teachers in their pre-service programs to determine where and how instruction might be expanded and strengthened.

55. The Ontario Association of Deans of Education should co-ordinate a project that supports the creation of province-wide educational materials for use in pre-service and in professional development programs for classroom teachers.

Current Teachers, Volunteers and Other School Board Staff

Education and training of student teachers should be complemented by ongoing education and training of current teachers, volunteers and other school staff, who are with students on a regular and prolonged basis. Associate teachers — those who act as mentors for student teachers — are, of course, included here, since their wisdom or misconceptions about sexual misconduct will also be passed on to new teachers.

The best policies and protocols are ineffective if they do not reach those they govern and are not understood or not followed. Since this Report contemplates that every school board will develop policies, or will modify existing policies to address deficiencies or omissions identified here, ongoing education and training is of critical importance.

Recommendations 56 to 58: Continuing Education

56.1 All teachers, principals, vice-principals and other school staff and volunteers who are with students on a regular and prolonged basis should be provided with ongoing in-service training on sexual misconduct policies and protocols (on both abuse and harassment), and on their professional and ethical duties, including the protection of students through the reporting of known or suspected sexual misconduct.

56.2 In-service education and training should be provided on the topics identified in recommendation 52.2. The subject of sexual misconduct can be integrated with education and training on analogous subjects, such as physical abuse.

57. In-service training should provide, in writing, all relevant telephone numbers and contact names for a given school district. Up-to-

date board policies and protocols should be provided, together with any written materials that explain or summarize existing policies.

58. Principals, vice-principals, superintendents and directors of education or any other school officials who bear additional responsibility for addressing sexual misconduct should be given special training.

Students and Parents

A comprehensive prevention strategy needs to involve age-appropriate education for students, and information that is also available to parents. Such educational programming need not focus exclusively on teacher sexual misconduct, but might focus on all forms of sexual abuse and harassment - whether engaged in by persons in positions of trust or authority, strangers or fellow students. Programs should be designed to prevent sexual abuse and harassment and to encourage disclosure of past and ongoing victimization so that authorities can intervene and protect children.

Child abuse programs are often directed to preschool and elementary school children. The content and vocabulary will vary according to the developmental level of the grade. They differ in format and style, ranging from one to 12 or more sessions, and can utilize books and workbooks, films, live theatre, classroom discussion, roleplays and enactments. Program content also varies, with some programs specifically addressing sexual abuse prevention and other programs addressing a wider array of prevention topics such as bullying.

These programs need to be carefully designed to ensure that they do not produce undue anxiety and feelings of vulnerability, or harm a child's positive relationships with meaningful people in his or her life. Though some also believe that prevention programs encourage false allegations of maltreatment, one recent study suggests that these fears are unsupported.¹¹

¹¹ D. Oldfield, B.J. Hays & M.E. Megel, "Evaluation of the effectiveness of project trust: an elementary school-based victimization prevention strategy (1996) 20 *Child Abuse and Neglect* 821.

Students need to know where they can turn for help, and that effective help will be provided.

I have emphasized throughout this Report that my mandate is confined to sexual misconduct by educators. Having said that, it is obviously important that students be educated about sexual abuse and harassment perpetrated by anyone, not just teachers. The importance of education that sensitizes all students (and teachers) to the acceptable boundaries of behaviour, teaches respect for the sexual integrity and security of every person and dispels stereotypical notions about victims and perpetrators cannot be over-emphasized.

Parents should also figure prominently in any prevention strategy. They must also be alive to the signs of abuse; they are often well-situated to respond to disclosures of sexual misconduct, and should do so in a sensitive and appropriate manner. Consideration should be given to the most appropriate means of educating parents on these issues.

Recommendation 59 to 60: Education for students and parents

59.1 Students should be provided with age-appropriate education on sexual misconduct, designed to prevent sexual abuse and harassment and to encourage disclosure of past and ongoing victimization so that authorities can intervene and protect them.

59.2 Education should deal with sexual abuse and harassment, whether engaged in by persons in positions of trust or authority, strangers, or fellow students.

59.3 Education should sensitize students to the acceptable boundaries of behaviour, teach respect for the sexual integrity and security of every person, and dispel stereotypical notions about victims and perpetrators.

60. Strategies should be developed to make education and information available to parents.

I have identified the need for education and training of educators, students and parents on sexual misconduct. Any stakeholders presently involved in education should contribute cooperatively to the development of comprehensive educational programs. However, the availability and

effectiveness of such programming is dependent upon financial and other resources.

Recommendation 61: Resourcing education and training programs

61.1 The adequate education and training of prospective and current teachers, other school staff and volunteers, students and parents on sexual abuse and harassment require financial and other resources to ensure that educational programs are available and comprehensive.

61.2 The Government of Ontario bears the responsibility of ensuring the availability of these financial resources.

iii) Screening of Teaching Applicants and Reference Checks

Have you checked [teachers'] references? Experience in the discipline cases shows that all too often in the education system, references are not checked. There is more than one consequence. "Moving on" teachers of dubious competence has been part of our history. So has "moving on" teachers who have abused students. You will find one such case written up in this issue...

...
The moral? Check first. Hire later.¹²

Adequate screening of teaching applicants represents an important strategy for preventing sexual misconduct. Generally, screening is associated (sometimes exclusively) with criminal record checks.

Criminal record checks form one component of an adequate screening process. A criminal record check should be performed for every applicant for a teaching position, regardless of whether the applicant is seeking first-time employment or a transfer from another school, district, province or country. A criminal record check even upon a teacher transferring within a school board may reveal a record that was acquired during the applicant's previous

¹² Margaret Wilson, Ontario College of Teachers, "Registrar's Report", (June 1999) *Professionally Speaking*, online at <http://www.oct.on.ca/english/ps/PS9/registra.htm>.

employment, and was not known to that school.¹³ The College now requires a criminal record search for new teachers before they are designated as members in good standing.

Similarly, a disciplinary record search should be performed with respect to *every* applicant for a teaching position. The College advised me that it cooperates with other provincial colleges and, now, with similar bodies around the world to obtain and disseminate full disclosure of the disciplinary records of teachers.

This exchange of information is of great importance, particularly given the mobility of teachers, and the recognized need for teachers in Ontario. However, there are significant limitations upon the usefulness of criminal and disciplinary record checks. Most sexual misconduct cases do not involve teachers with a prior criminal or related disciplinary record. Criminal record checks will not reveal outstanding charges and are sometimes incomplete.

The most meaningful screening process entails a detailed application form, a thorough interviewing process, and verification, including reference checks that involve a full and candid exchange between the prospective and former employers.

Screening should not be confined to teachers. School staff who are in a position of trust or authority over students or who are exposed to children on an ongoing basis should be similarly screened.

Volunteers pose a thorny problem. It is obvious that not all volunteers, who include parents on field trips, extramural sports events or other after-school activities, can or should be screened, particularly where volunteers have sporadic involvement with, or little or no unsupervised access to students. However, volunteers who are endowed with exceptional levels of trust involving frequent, lengthy and unsupervised contact with students should be screened in a manner consistent with their voluntary status. A

¹³ For example, I was advised of one case where a principal was trying to replace a teacher charged with sexual abuse of students. She found out, from contacting the references, that one of the applicants from inside the board was also facing sexual assault charges. She admitted that normally she might not have checked the references.

number of community, volunteer-based organizations have developed protocols respecting screening.¹⁴

Verification of the applicant's suitability, through reference checks, is dependent upon the completeness and accuracy of the information provided by the former employer.

Full and accurate information may not be available or, even if available, provided where:

- (a) material facts have never been documented or documentation has not been retained;
- (b) the former employer perceives, incorrectly, that privacy legislation prevents disclosure of material facts; or
- (c) the former employer was a party to a settlement with the teacher that compels non-disclosure or limited disclosure of material facts to a prospective employer.

Each of these concerns is addressed later under "barriers to full disclosure facing prospective employers".

Recommendations 62 to 69: Screening of applicant teachers

General

62. School board policies and protocols should specifically address the screening of applicant teachers, in conformity with the recommended procedures that follow.

Records Checks

63. A criminal and disciplinary record check should be performed with respect to *every* applicant for a teaching position, regardless of

¹⁴ The provincial government recently established the Ontario Screening Initiative, a program to promote the screening of volunteers and other people in positions of trust among community groups: Ministry of Citizenship, Culture and Recreation, News Release "Sex Offenders Targeted by Ontario Government Safety Initiatives" (October 5, 1999).

whether the applicant is seeking first-time employment or a transfer from another school, district, province or country. School boards must also verify that the applicant is a member in good standing of the Ontario College of Teachers.

Application Forms

64.1 The screening process should generally entail a detailed application form, a thorough interviewing process, and verification of information, including reference checks that involve a full and candid exchange between prospective and former employers.

64.2 The application form should be comprehensive and standardized.

64.3 The application form should request complete information about experience, training, employment history, past supervisors, reasons for leaving past employment, dates, places and addresses of all prior employers. It should note that providing deliberately misleading information can be just cause for dismissal. It should also include a consent to verify the information provided and to conduct a criminal record check.

64.4 Applications should require prospective employees to disclose whether they have been found guilty of or are currently the subject of an allegation of child abuse or sexual harassment, or have ever resigned while such allegations were pending.

Applicant Interviews

65. In-depth personal interviews should be conducted of all applicants that should include direct questions about past behaviour with students and staff.

References

66.1 Verification of information provided, through direct contact with employment references, should be designed to:

- (a) ensure that the material information provided by the applicant is correct and complete;

- (b) identify any weaknesses or problems with the applicant's performance;
- (c) fill in any gaps in employment history or experience;
- (d) ask references about any defects in the applicant's fitness for the position by explaining the job description and inquiring about the applicant's skills and suitability for the tasks as defined, taking care to explain the position of trust in which the applicant will be placed with children.

66.2 References should be asked directly whether they know of any reason why the applicant should not be hired to work with children.

66.3 School boards should respect the privacy and equality interests of applicants. Queries should be limited to job-related matters and conform to fair employment practices.

No Offer

67. No offer of employment should be made by a school board until a full investigation has been completed.

Other School Staff

68. Screening should not be confined to teachers. School staff who are in a position of trust or authority respecting students or who are exposed to children on an ongoing basis should be similarly screened.

Volunteers

69. Volunteers who are endowed with exceptional levels of trust involving frequent, lengthy and unsupervised contact with students should be screened in a manner consistent with their voluntary status.

Where there are teacher shortages and school board needs are greatest, there is sometimes an inclination to bypass established screening

processes. However, student safety must remain the paramount consideration.

iv) Codes of Conduct

Sexual Misconduct¹⁵

We are personally responsible for our actions. No one, regardless of his/her position, can force us to commit or condone an illegal or unethical act. Dishonest or unethical behaviour is unacceptable. In addition, we must perform our jobs and conduct our business affairs ethically, legally and with the utmost integrity; seek advice or help when faced with a difficult ethical situation; employees who believe they know of a breach of the code have a duty to raise the matter with their supervisor or another member of the senior administration without fear of reprisal.¹⁶

In Chapter IV, I recommended that sexual misconduct be defined and the definition included in the Ontario College of Teacher's Code of Ethics and as a category of professional misconduct. Such an approach would represent a province-wide standard of conduct for members of the College. I also suggested that there is a need for codes of conduct to be contained in the policies and protocols of each Ontario school board for the following reasons:

First, the *OCTA* and any Code of Ethics adopted by the College cannot extend to school volunteers or employees who need not be members of the College. Board policies can and should extend to such persons.

Second, a code of conduct is more likely to be disseminated and made known to all interested parties, including the community, if expressly incorporated into the policies and protocols of each school board.

¹⁵ For the reader's convenience, there is some repetition here of the analysis adopted in Chapter IV.

¹⁶ Excerpt from the Halton Board of Education Code of Conduct.

Third, individual school boards are entitled, as a matter of policy, to discourage or prohibit activities which may not constitute sexual misconduct *per se* but which nonetheless raise boundary issues: for example, to what extent should teachers be giving students rides home, or to after-school activities, exchanging gifts with students, or having them sleep over at their residences? The answers to some boundary questions may depend upon local circumstances and, in any event, may not be the subject of consensus across the province.

Recommendation 70: Defining sexual misconduct in school board policies

70.1 Codes of conduct that define and explain sexual misconduct (outlined below) should be contained in school board policies and protocols. These policies should incorporate the minimum standards of conduct that apply across Ontario (and as may be reflected in the College's Code of Ethics), but may yet impose higher standards of conduct to address local concerns or circumstances.

As noted elsewhere in this Report, while the term "sexual abuse" is appropriately used to define the reporting obligation under the *CFS4*, it is ill-suited to embrace the full range of sexual activity that should be proscribed in school board codes of conduct. Hence, the term "sexual misconduct".

70.2 No school employee or volunteer shall engage in sexual misconduct. Sexual misconduct is "offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment".

70.3 "Sexual misconduct" includes, but is not limited to:

Sexual Abuse

- (a) **conduct which would amount to sexual interference, an invitation to sexual touching, sexual exploitation, sexual exploitation of a person with a disability, an indecent act or exposure, or a sexual assault or other crime which may affect the personal integrity or security of any student or the school environment;**

Commentary:¹⁷ These are all offences under the *Criminal Code*.¹⁸ These offences could involve a teacher's own students, other students or children, or even adults, if the fact that the teacher has engaged in the conduct might tend to affect the personal integrity or security of students or the school environment.

Examples: Touching a student for sexual gratification; inviting a student to touch the teacher for sexual gratification; a sexual relationship with a student; exposure of genitals to a student for sexual purposes; any touching of a student that violates that student's sexual integrity, whether sexually motivated or not.

Sexual Harassment

- (b) **objectionable comments or conduct of a sexual nature that may affect a student's personal integrity or security or the school environment. These may not be overtly sexual but nonetheless demean or cause personal embarrassment to a student based upon a student's gender.**

Commentary: This includes, but is not limited to, conduct that would amount to sexual harassment or sexual discrimination under the *Ontario Human Rights Code*.¹⁹ Certain objectionable conduct or comments are incompatible with the role of a teacher, regardless of whether the affected students regard them as "unwelcome". A single event may constitute harassment. Sexual harassment includes reprisals or threatened reprisals for rejecting sexual advances.

Examples: Gender-related comments about a student's physical attributes; unwelcome or gratuitous physical contact; suggestive or offensive remarks or innuendoes about students of a specific sex; propositions of physical intimacy;

¹⁷ Though I discuss many of the recommendations that follow, I sometimes provide more formal "**Commentary**" or "**Examples**" which may be incorporated directly into policies or protocols.

¹⁸ R.S.C. 1985, c. C-46, as amended.

¹⁹ R.S.O. 1990, c. H.19, as amended.

gender-related verbal abuse, threats, or taunting; leering; bragging about sexual prowess; requests for dates or sexual favours; offensive jokes or comments of a sexual nature about a student; display of sexually offensive pictures, graffiti or other materials; highly personal questions or discussions about sexual activities; rough and vulgar humour or language related to gender; repeated “compliments” regarding a student’s appearance, hair and clothes.

Sexual Relationships Generally

- (c) any sexual relationship with a student, or with a former student under the age of 18, and any conduct directed to establishing such a relationship**

Commentary: Though sexual relationships with *students* under 18 almost certainly constitute crimes, this paragraph explicitly prohibits any sexual relationship with a student and does so regardless of age.²⁰ It is not necessary that the student be in the teacher’s own classroom. This paragraph also prohibits sexual relationships with a former student who is under the age of 18. Conduct that is directed to establishing such sexual relationships is also prohibited. Responsibility for ensuring that a teacher-student relationship is appropriate rests with the teacher, and not the student. This remains the case even if it is the student who attempts to initiate the relationship.

Examples: Intimate letters from teacher to student; personal telephone calls; sexualized dialogue through the internet; suggestive comments in the classroom; dating.

Some school boards take a different approach to *former* students. For example, the Toronto District School Board policy prohibits staff and volunteers from entering into a sexual relationship with a student during the course of the professional relationship *or for a period of one year thereafter*.

²⁰ Sometimes teachers who have sexual relationships with older students, which they characterize as “consensual”, do not make the connection between their activities and criminal offences, sexual abuse or sexual exploitation. This explicit language is designed to address that concern.

The *Education Act*²¹ generally provides that children must attend school until the end of the school year in which the child attains the age of 16. Sometimes, teachers commence sexual activity with children under the age of 18 once they leave school. In my view, teachers do so to the potential detriment of their former and current students. The power differential between teacher and former student, the fact that the evolution of their relationship commenced in the teacher-student context and, of course, the teacher's status as the child's former teacher all raise concerns about the young person's vulnerability and weakness and the continuing existence of a power imbalance.

Equally important, sexual activity with a former student raises issues of concern in the teacher's current school environment. Are the teacher's classes perceived as an opportunity to cultivate students for future sexual relationships? Can students feel secure and protected in this environment? Is a teacher's relationship with a former student reconcilable with the need for public confidence in that teacher and in the educational system? A student who leaves school may later choose to resume studies at the school where the teacher works, or at another school. This is why I have recommended a province-wide prohibition upon sexual activity between a teacher and former student under the age of 18.

Sometimes, teachers commence sexual activity with former secondary school students who have already attained the age of 18. Some of the same concerns obtain here as well. However, the ability to regulate the conduct of teachers and former students now over the age of 18 is less certain. This is particularly so, in the context of university and college students, mature students and adult education students. So as not to be misunderstood, I need to reiterate that any conduct by a teacher during the teacher-student relationship, regardless of the respective ages of the parties, which establishes or is directed to establishing a sexual relationship, should be strictly prohibited.

Accordingly, while I have not recommended a policy that also prohibits relationships with former students of whatever age within a certain time frame, school boards may consider whether such an additional standard should be imposed. Of course, any codes of conduct must be reasonable and authorized by law.

²¹ R.S.O 1990, c. E.2, section 21(1)(b).

Further Unacceptable Behaviour

Apart from standards or codes of conduct that establish what sexual misconduct is, a number of interested parties have, indeed, urged that board policies should be established to address related conduct, that is, unacceptable behaviour that is not sexual misconduct *per se*. For example, these suggestions were made:

Board Policies should be established to deal with the following: gift-giving, writing of notes of a personal nature, not staying over at teachers' residences, coaches relating to students in schools, locker room activity, behaviour on tournaments, driving students home from games or practices. Board policies should also be made for other disciplines where teachers have interaction with students outside the regular school day, such as drama and music.

Board policies outlining the obligations of teachers regarding off-duty conduct, relating to other venues that involve students or young people, e.g. plays, concerts, sports teams, choirs, boy scouts, socializing at bars, should be implemented to aid in protecting students.²²

Some of these activities, such as writing notes of a personal nature, may well manifest sexual harassment or a sexual relationship between teacher and student and, as a result, would already be encompassed in the definition of sexual misconduct. Some of these activities, such as staying over at teachers' residences, or driving students home from games or practices, may or may not be incidental to sexual misconduct or represent a prelude to misconduct. These activities cannot be characterized, in and of themselves as sexual misconduct, but may nonetheless be subject to some regulation to avoid sexual impropriety or the appearance of it. Again, the challenge is to create policies that do not inhibit normal social interaction between teachers and students, but enhance a nurturing environment while protecting students.

In my view, it would be unwise, indeed impossible, to create a province-wide policy that defines, for example, when a teacher can or cannot

²² Ontario Teachers' Federation submissions.

drive a student home from school. I can contemplate situations, depending upon the locale, personal circumstances or exigencies, where this activity would be entirely appropriate, and others where it would raise serious concerns. Similarly, students should generally not be staying over at teachers' residences. However, one can conceive of circumstances where this could occur appropriately: for example, where the student is a classmate of the teacher's own child.

That is why I recommended in Chapter IV that a broad standard of conduct be adopted province-wide that recognizes the need for flexibility and enables individual school boards to create more specific rules to meet local concerns or circumstances.

Recommendation 71: Further defining unacceptable conduct

71.1 Codes of conduct contained in school board policies and protocols should address activities that, standing alone, may not constitute sexual misconduct but should nonetheless be prohibited or discouraged. Policies should incorporate the minimum standards of conduct that apply across Ontario (and as may be reflected in the College's Code of Ethics), but might impose more specific rules to address local concerns or circumstances.

71.2 A school employee or volunteer should avoid activities that, standing alone, might not constitute sexual misconduct but would raise concerns in the minds of a reasonable observer as to their propriety. School employees and volunteers should be mindful of these and other considerations, in evaluating the propriety of activities:

- (a) whether the activities are known to, or approved by, supervisors and/or parents or legal guardians;**
- (b) whether the student is isolated;**
- (c) whether urgent or exigent circumstances obtain;**
- (d) whether the school environment might be detrimentally affected by the activities;**

- (e) to what extent may the activities be reasonably regarded as posing a risk to the personal integrity or security of a student, or as contributing to any student's level of discomfort.

D. Intervention Strategies: Responding to Complaints or Suspicions

To this point in the chapter, I have addressed *prevention* strategies to reduce the likelihood that sexual misconduct will occur or re-occur. I now turn to *intervention* strategies that are designed to encourage disclosures of true sexual misconduct, and the responses to complaints or suspicions of sexual misconduct that best protect students, while treating suspected teachers fairly. Most of the boards responding to our survey do not have procedures in place to govern their response to complaints of sexual misconduct made about teachers, other staff or volunteers.

Of course, prevention and intervention strategies overlap. For example, proper documentation of a disclosure both enhances the investigative process and may also prevent further misconduct.

It is important to bear in mind here that complaints about sexual abuse are, in some respects, to be addressed differently than complaints about other sexual misconduct or unacceptable behaviour, short of abuse.

i) Receiving a Sexual Misconduct Complaint

When disclosures by students of alleged sexual misconduct are made, they must be responded to appropriately. An important component of an appropriate response is how the complaint is first received. Because a child might pick anyone to hear an allegation of sexual misconduct - and because the first reaction to the child is often crucial - training on how to respond should be required of all school board employees, not just teachers. As I noted in Chapter III, the emotional impact of being sexually abused or harassed may depend in large measure upon how the initial disclosure is received. Gratuitous trauma may result from responses that seek to minimize or discount truthful disclosures.

Recommendations 72 to 73: Receiving an initial complaint

72. School employees should be trained on how to detect the warning signs of sexual misconduct and, further, how to respond to disclosures of sexual misconduct.

73. School board policies and protocols should contain basic “dos and don’ts” that should guide such situations. Some examples follow:

DO**DON'T**

Listen to the child.

Do not lead or suggest answers to the child.

Tell the child who must be notified.

Do not promise the child not to tell anyone.

Reassure the child that the conduct described is not the child’s fault and that the child has done the right thing by disclosing.

Do not criticize the child for how or when disclosure has been made.

Speak to the child in privacy.

Do not bring the suspected teacher in to confront the child.

Determine the immediate safety needs of the child, involving the child in this decision.

Do not return the child to a risk-laden situation.

ii) Reporting Suspected Sexual Abuse, Harassment and Other Misconduct

In Chapter IV, I addressed the scope and content of the duty to report known or suspected sexual abuse to the authorities and the duty to intervene to protect a student from known or suspected sexual misconduct, short of abuse. I also dealt with the interaction between these duties and section 18(1)(b) of the Regulation under the *Teaching Profession Act*.

Children's aid societies identified barriers to the reporting of sexual abuse as perhaps their foremost concern. In their response to the questionnaire, they listed pre-existing relationships with the suspected teacher, lack of knowledge regarding the duty to report, requests by students for secrecy, confusion over reporting pathways (whether reporting should be made to the College, police, or a children's aid society, in what order, and whether directly or through principals or other supervisors), and the misperception that the suspected teacher must be notified that such a report will be or has been made, as significant hurdles to reporting. Some specific responses included:

Collegial relationships...discourage reports and shed unfavourable light onto Board/profession.

Other school personnel reluctant to make call to CAS or may not interpret activity as abuse, sometimes purposefully.

The teachers' association policy of notifying the other teacher within twenty-four hours of a complaint against them is a definite deterrent and undermines the CAS investigative process.

The sense that all school personnel belong to the same "Federation" has created a protective shield that makes it difficult for individuals to speak out and report concerns.

Some or all of these concerns were shared by other interested parties, including police forces.

On the other hand, some teachers' associations maintain that a culture of over-reporting complaints that are either groundless or do not involve criminality results in children's aid societies and police officers being brought in to address unclear boundary issues, and frivolous or ill-motivated complaints, rather than truly reportable abuse.

Undoubtedly, both perspectives have some validity. My review leads me to conclude that reporting of valid complaints of sexual abuse is sometimes inhibited by the barriers identified by children's aid societies. The DeLuca case is but one illustration. On the other hand, there are matters reported to children's aid societies or to the police which, upon a correct

understanding of the law, were not reportable, either because there was no factual basis to do so or because the complaints, even if true, could have been properly addressed within the disciplinary context.

The challenge here is to develop policies and protocols that correctly reflect existing law, reinforce the obligation to report, where appropriate, and still show fairness to the affected parties, including teachers. However, so as not to be misunderstood, uncertainty needs to be resolved in favour of the best interests of the child. One principal summed up the dilemma in this way:

My first reflex is to defend the teacher, but I have a duty to defend the child. Between the good of the teacher and the good of the child, we'll always defend the good of the child... We have no choice.²³

The following recommendations address the content of policies for reporting to a children's aid society, to the police and internally.

Recommendations 74 to 81: Reporting policies

General

74. School board policies and protocols should define the reporting obligations of school employees and volunteers respecting complaints or disclosures of sexual abuse or other sexual misconduct perpetrated against students and outline the procedures for reporting. Components of such policies and protocols are outlined below.

Sexual Abuse of Student under 16

75.1 Every person who has reasonable grounds to suspect that a student under the age of sixteen²⁴ has suffered or is at risk of likely suffering one or both of the following must forthwith report the

²³ I. Peritz, "J'Accuse: a teacher's worst nightmare" *Globe and Mail* (January 29, 2000).

²⁴ If the student is the subject of a protective order under the Child and Family Services Act, the obligation to report extends to a child who is under 18 years of age: CFSA, s. 37(1).

suspicion and the information on which it is based to a children's aid society:

- (a) **sexual molestation or sexual exploitation by a teacher or another person having charge of the student;**²⁵
- (b) **emotional harm demonstrated by serious anxiety, depression, withdrawal, self-destructive or aggressive behaviour, or delayed development, and there are reasonable grounds to believe that the emotional harm resulted from the actions of a teacher or other person having charge of the child.**²⁶

75.2 Every school employee and volunteer has this obligation.

75.3 Failure to report may constitute an offence under the *Child and Family Services Act* and, for a teacher, may also constitute professional misconduct.

75.4 The duty to report is a personal obligation and cannot be delegated to anyone else, including a school principal. This means that the person who has a duty to report must do so directly to a children's aid society.

75.5 The duty to report is ongoing. Where additional reasonable grounds to suspect abuse or the risk of abuse become known, a further report must be made.

²⁵ Or, by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child. In my view, sexual molestation and sexual exploitation are, in essence, the same as "conduct which would amount to sexual interference, an invitation to sexual touching, sexual exploitation, sexual exploitation of a person with a disability, an indecent act or exposure, or a sexual assault or other crime which may affect the personal integrity or security of any student or the school environment".

²⁶ This recommendation is based upon amendments to the *CFS4* which have been passed by the legislature but not yet proclaimed as of February 29, 2000, the completion date of this Report. Circumstances other than sexual abuse that also compel reporting (such as physical abuse) are not addressed here.

75.6 The duty to report applies, even where information is acquired in confidence, or second-hand.

Commentary: This legal obligation promotes the early reporting of suspected child abuse. A standard of “reasonable grounds to suspect” (rather than knowledge or reasonable grounds to believe), a requirement that reporting be done *forthwith* and that there need only be reasonable grounds to suspect that the student is at *risk* of likely abuse all support an approach that favours early, outside intervention, putting the student’s safety first. Indeed, recent amendments to the *CDSA* have replaced *substantial risk* with *risk*, further lowering the reporting threshold.

Commentary: No preliminary evaluation or investigation of suspected sexual abuse should be undertaken by school officials prior to fulfilment of the reporting obligation, where the duty to report is apparent. Any subsequent investigation should be governed by protocols developed between school boards, children’s aid societies and police. This approach is intended to preclude jeopardizing any formal investigation by the police or children’s aid society and to avoid gratuitous harm to the student-complainant.

Policies and protocols may also specifically outline the legal protection afforded those who report reasonable suspicions of abuse.

Sexual Abuse of Student 16 or Over

76. Every person who has reasonable grounds to suspect that a student sixteen years of age or older has suffered or is at risk of likely suffering one or both of the following should forthwith report the suspicion and the information on which it is based to the police:

- (a) sexual molestation or sexual exploitation by a teacher or another person having charge of the student;
- (b) emotional harm demonstrated by serious anxiety, depression, withdrawal, self-destructive or aggressive behaviour, or delayed development, and there are reasonable grounds to believe that the emotional harm resulted from the actions of a teacher or other person having charge of the child.

Policies and protocols may also provide for specific resource persons who may be contacted for advice about the reporting obligation to children's aid society or to the police.

Some students are reluctant to involve the police. It is clear that a school is not bound by a student's own decision to decline to make a police complaint. Having said that, there are often larger issues of school safety that should prevail. It must be recognized that the failure of a student complainant to cooperate with police may effectively prevent or hamper a full police investigation on the merits. Schools may be well situated to support students in a decision to cooperate with police.

I also note that, if the accused teacher, employee or volunteer has access to children under 16 years of age, the reporting obligation to CAS will be triggered, regardless of the age of the particular student suspected to have been abused.

Addressing Immediate Needs

77. Whether a report is made to a children's aid society or to the police, the school should address immediate issues relating to the student's best interests with CAS or the police. Protocols should provide examples of matters to address:

- (a) **will the student be interviewed and when;**
- (b) **where will the student be interviewed;**
- (c) **will a support person be permitted to attend any interview and if so, who will that support person be;**
- (d) **should the student's parents be contacted; if so, how and when. This issue may also be dependent upon the student's age and whether he or she wishes to notify his or her parents; and**
- (e) **what information can be shared with parents or the student;**

These and other matters may be elaborated upon in joint protocols of the local children's aid societies, police and school boards.

Internal Reporting of Alleged Sexual Abuse

78. Where an employee or volunteer reasonably suspects sexual abuse, he must also promptly report to his principal or the principal's designate. Policies and protocols should also provide for a further reporting chain from the principal/designate to a superintendent to a director and ultimately to the board.

In addition, protocols may provide that any employee or volunteer who is charged with certain crimes or who becomes aware that another employee or volunteer has been so charged, must advise the principal/designate. During this review, I learned that boards sometimes remain unaware that their teachers have been charged with sexual offences, particularly those allegedly committed outside the classroom.

Sexual Misconduct or Related Behaviour That is Not Abuse

79.1 Every school employee or volunteer has a duty to students of any age to intervene to protect them from being the victims of sexual misconduct.

79.2 Where a school employee or volunteer knows or reasonably suspects that a student has been sexually harassed or has been the victim of sexual misconduct short of abuse, he or she must report the suspicion forthwith, and the information upon which it is based to the principal or the principal's designate.

79.3 Policies and protocols should also provide for a further reporting chain from the principal or the principal's designate to a superintendent to a director and to the board, depending here upon the nature of the conduct.

As noted immediately below, unlike allegations of sexual abuse, some behaviour may be addressed quickly and informally and will not necessarily be the subject of mandatory reporting protocols extending right up the supervisory chain.

79.4 Such policies may reflect that *some* behaviour can be addressed informally and resolved through discussion with the teacher or teacher counselling.

It is important to draw distinctions here between conduct that must be addressed through outside or internal investigation and behaviour that clearly can be addressed quickly and informally. Again, this presupposes that principals and others are trained to appreciate and apply these distinctions. It also presupposes that they understand that, in some cases, relatively innocuous behaviour signals a more troubling concern.

Inapplicability of Section 18(1)(b) of the Regulation under the Teaching Profession Act

80. No teacher who makes a report to the police, a children's aid society or to school officials of suspected sexual misconduct by another teacher, has any obligation, prior to or upon making such a report, to inform the other teacher of that report or to provide that teacher with a written statement of the report.

Commentary: This recommendation clarifies that section 18(1)(b) of the regulation under the *TPA* has no application to reports of sexual misconduct.²⁷

Policies and protocols may also address the concern that school employees and volunteers not interfere in any ongoing investigation by the police and the children's aid society. This may mean that they seek instructions or advice from investigators before informing the suspected person of details pertaining to the case.²⁸

²⁷ In Chapter IV, I recommended that section 18(1)(b) be amended to make its inapplicability to reports of sexual misconduct clear.

²⁸ Certain instructions cannot be given by police: for example, potential witnesses cannot be told that they cannot speak with defence investigators. Witnesses may or may not do so, in their own discretion.

Threats or Reprisals

81.1 Policies and protocols should specifically state that the school board has the duty to protect anyone from threats or reprisals for disclosing, reporting or otherwise providing information with respect to alleged sexual misconduct.

81.2 Such policies should outline the consequences for employees or volunteers of engaged in, or threatening to engage in, such reprisals.

iii) Reporting to the College of Teachers

In Chapter IV, I examined significant deficiencies in the statutory obligation upon school boards to report suspected misconduct to the Ontario College of Teachers imposed by section 47 of the *Ontario College of Teachers Act, 1996*. For convenience, some of my earlier comments are reproduced here.

Section 47(2) requires school boards to notify to the Ontario College of Teachers only upon a member's conviction. Where a conviction is not registered, *for whatever reason*, section 47(2) has no application. I was advised by several school boards that they do await the criminal disposition before determining whether to notify the College. A criminal charge is predicated upon the informant's sworn belief, on reasonable grounds, that the accused has committed the offence charged, and the charge, in itself, may therefore indicate that an investigation by the College is warranted. Further, the commission of certain crimes may affect the suitability of the member to practice, or amount to conduct unbecoming a member, even though such conduct does not involve sexual conduct and minors, or a risk of harm or injury to students, as required by section 47(2).

Section 47(3) confers unfettered discretion upon a school board. The evidence presented to me demonstrates that the section is interpreted unevenly and sometimes in a manner inconsistent with the overriding need to protect students. It appears that cases which obviously should have engaged section 47(3) were not reported to the College. In some cases, school boards did not notify the College, *despite themselves dismissing teachers for sexual misconduct*.

More significant, in a number of cases, school boards and teachers' unions negotiate the resolution of sexual misconduct cases. The teacher may agree to resign. The school board may agree to provide a neutral letter of reference or to not disclose the allegations which brought about the teacher's resignation. The benefits to the parties are apparent. School boards are spared the enormous expense and delay associated with the grievance process and need no longer employ the teacher. On the other hand, the teacher's career may continue elsewhere, unaffected by the allegations of sexual misconduct. Without reflecting in any way upon the parties involved, this process may lead to the "passing of the trash". I further address agreed-upon resignations and letters of reference later in this chapter.

Counsel for the school boards and teachers' unions with whom I met understood that an agreement by the school board not to notify the College, where notification was required, was contrary to public policy and unlawful. However, the reality is that the unfettered discretion conferred by section 47(3) permits school boards too easily to form the opinion that the teacher's conduct need not be reviewed. This opinion may be coloured by the desirability of resolving these cases quickly and obtaining the teacher's resignation. Indeed, some school boards may generally interpret section 47(3) so as to require no notification where the allegations remain unproven because the suspected teacher resigns.

Hence, I have recommended amendments to section 47 and to the *Education Act* to address these concerns.

Whether or not these amendments are made, school boards are entitled to create protocols that impose a higher obligation upon themselves, consistent with the protection of their students and the public interest. The recommended protocols that follow articulate, in my view, disclosure obligations of school boards that are consistent with their responsibility for student safety.

Recommendations 82 to 83: Reporting to the Ontario College of Teachers

82.1 School board protocols should outline the circumstances under which disclosure should be made to the Ontario College of Teachers of information relevant to whether a teacher has engaged in sexual misconduct. These protocols should include the following components.

82.2 A school board shall promptly notify the College in writing when the board becomes aware that a member who is or has been employed by the board:

- (a) has been charged with an offence under the *Criminal Code (Canada)* which, if proven, may amount to offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment; or**
- (b) has been found guilty of such an offence.**

82.3 Where a school board dismisses, suspends or otherwise disciplines a member of the College in its employ for engaging in sexual misconduct, it shall promptly notify the College in writing of the disciplinary action, giving reasons.

82.4 If a member of the College resigns during an investigation into allegations that the member engaged in sexual misconduct, a school board shall promptly notify the College in writing of the circumstances surrounding the resignation.

82.5 In addition, a school board shall promptly notify the College in writing where, in the opinion of the board, the conduct or actions of a member who is or has been employed by the board should be reviewed by a committee of the College.

83. Principals and supervisory officers shall promptly report to their school board information relevant to that board's obligation to disclose to the College of Teachers.

Commentary: The College, pursuant to section 47(1) of the *OCTA*, may require a school board to provide it with information to enable it to carry out its objects, including personal information within the meaning of municipal or provincial privacy legislation respecting members of the College. Accordingly, there is no impediment preventing a school board from informing the College fully as to the relevant circumstances or background of the suspected teacher.

iv) Investigating Allegations of Sexual Misconduct

Any investigation of sexual abuse will be conducted by the police and/or the local children's aid society. These investigations should be governed by joint protocols between police, children's aid societies and school boards. School board investigations may be conducted into sexual misconduct or other unacceptable behaviour unrelated to abuse which need not be reported to the children's aid society or to the police. As well, school boards will generally need to evaluate how to proceed after the children's aid society or the police have declined to conduct an investigation, have completed an investigation or after criminal proceedings have taken place.

At the end of Chapter IV, I discussed the desirability of minimizing the number of instances where victims of sexual misconduct should be obliged to testify or recount their own victimization. This concern should figure prominently in the development of protocols on how allegations of sexual misconduct are to be investigated and by whom. Such protocols should minimize the number of times that an alleged victim is required to be interviewed by the various agencies involved before criminal or administrative proceedings are commenced. This objective is best achieved by inter-agency co-operation from the earliest stages of the investigation.

School boards should recognize that the police and children's aid societies, jointly, are better equipped than they are to investigate allegations of sexual abuse. In addition, an investigation by these agencies has the added benefit of protecting a school board from allegations of bias. Minimizing the trauma caused by multiple interviews, avoiding allegations of bias, and the relative expertise of the police and children's aid societies are all reasons why, in sexual abuse cases, interviewing should be left to the appropriate agency.

However, where the allegations do not fall within the definition of sexual abuse, and a board is obliged to conduct its own investigation, the

board should again adopt a strategy designed to reduce the number of times an alleged victim is interviewed. Planning and co-operation between those with a legitimate interest in the investigation is key to minimizing the trauma for the victim of re-living disturbing memories over and over.

Recommendations 84 to 86: Investigating sexual misconduct

84. School board policies should specifically address how and when internal investigations are to be conducted. As well, school board protocols or interagency protocols to which school boards are a party should address the interaction between boards and outside investigations. Matters that should be addressed include:²⁹

- (a) the relative roles and joint participation of the children's aid society³⁰ and police in the conduct of investigations of sexual abuse. Protocols may provide that the police have prime responsibility for the criminal investigation and any criminal charges arising therefrom. The CAS has prime responsibility for any child protection investigation and for protection of the child;**
- (b) the factors affecting the timing of the investigation and of the initial interviews;**
- (c) the factors affecting the location of interviews, particularly those relating to when CAS or police can or should interview a student on school property;**

Crown counsel noted this to be a significant issue in a number of cases.³¹ A sexual abuse investigation can be seriously undermined by an early

²⁹ These matters are in addition to protocols discussed elsewhere in this chapter. For example, reporting to CAS, earlier addressed, is an important matter to be dealt with in joint protocols.

³⁰ And/or Native Child and Family Services.

³¹ See for example, Metropolitan Toronto *Child Sexual Abuse Protocol*, 3rd ed. (The Metropolitan Toronto Special Committee on Child Abuse, March 1995) at 63.

dispute over whether the child will be permitted to speak to CAS or police. Protocols establishing the respective roles of CAS, police, the school principal and the parents are critical.

- (d) the factors affecting whether parents will be contacted prior to any interviews, or at all;
- (e) interviewing techniques that enhance or detract from the accuracy, reliability and completeness of the student's account;
- (f) the assignment of investigators with specialized training and skills respecting child sexual abuse cases;
- (g) special needs of students with disabilities;
- (h) the desirability of early videotaping of student interviews, subject to articulated exceptions;³² procedures for videotaping; and retention and access to videotapes;
- (i) medical examinations of the student;
- (j) the obligation of school boards to contact the CAS or police if the student-complainant transfers to another school or board;
- (k) the exchange of information between CAS and/or the police and the school board. This may involve the designation of a school employee as case coordinator or liaison;
- (l) the status of any internal investigation, pending an ongoing CAS or police investigation or criminal charges. In the least, protocols should caution against

³² For example, videotaping was used to facilitate the abuse.

the interviewing of the student-complainant or the suspected party by school officials and may articulate the dangers associated with conducting a concurrent investigation;

Protocols should stress that any questioning of the student by school staff should be done only to clarify the nature of the complaint, if any. Once the matter is reportable to the police or CAS, school staff should not conduct an investigation. Such an investigation can contaminate the student's testimony through suggestive questioning, can unduly traumatize the student through repetition of the critical events and may affect the fullness of later disclosure to CAS or the police.

- (m) the obligation of the school principal or designate to ascertain the status of an ongoing investigation by CAS or police, if no apparent action has been taken to investigate or continue to investigate an allegation of sexual abuse;**
- (n) when a support person will be permitted to remain with a student-complainant during any interviews;**
- (o) when a suspected employee or volunteer should be notified that an allegation has been made against him or her;**
- (p) at what stage of the investigation should the suspected party be given an opportunity to address the allegations and what information should be provided to that party and/or his or her counsel to enable them to address the allegations.**

School boards will not assume prime responsibility for crafting protocols that most directly relate to the conduct of CAS and/or police investigations. Greater weight should be placed upon their involvement in adopting interagency protocols that affect their internal investigations or their interactions with CAS and police.

85.1 School board policies and protocols should specifically address how and when internal investigations will be conducted and by whom.

85.2 Any investigation conducted by the school should be informed by the desirability of:

- (a) avoiding or reducing trauma to the student through unnecessary or inappropriate interviewing;
- (b) respecting the confidentiality and privacy interests of all affected parties, to the extent possible;
- (c) ensuring fairness to the school employee or volunteer against whom a complaint has been made;
- (d) ensuring an accurate determination, free from stereotypical notions about sexual misconduct, students or teachers.

86. Policies and protocols should ensure that any internal investigation is conducted by school staff with appropriate training and skills.

The need for specialized training and skills again reinforces policies that defer investigations of sexual abuse to police and children's aid society investigators and avoid re-interviewing of witnesses subsequent to an external investigation.

v) Duties to Students as Complainants: Support Structures

It is difficult to convey adequately the tremendous vulnerability of a young person who discloses sexual abuse or harassment by a person in authority. They are compelled to discuss intimate details, frequently with complete strangers. They often face resentment and hostility, attacks upon their character and credibility, and may be harassed. Their relationship with teachers, fellow students and their schooling almost inevitably changes. They often suffer physical, psychological or emotional harm both from their initial victimization and the process that follows its disclosure. They also experience anger, fear, loneliness, regret or isolation.

School boards must recognize the difficulties faced by students who disclose sexual misconduct by a teacher. Proper support for students must

be provided to permit an environment conducive to disclosure. It is especially important to remember here that disclosure may be an ongoing or incremental process. The following recommendations are designed to protect these young people from unnecessary harm.

Recommendations 87 to 91: Support structures for student complainants

General

87. School board policies and protocols should specifically ensure that support structures are in place for students who disclose alleged sexual misconduct. These support structures are contained in the following recommendations.

Support Persons

88.1 Policies and protocols should specifically address the presence of support persons during interviews with students. Where these interviews involve the children's aid society or police, interagency protocols should address this issue.

88.2 Such policies and protocols should specifically provide for the availability of school staff to remain with students who have disclosed sexual abuse until CAS or police investigators interview these students, if the interviewing is imminent, or if the student is otherwise in need of support.

88.3 A support person may be the school employee or volunteer to whom initial disclosure was made, a designated case coordinator, social worker, student services worker or another person. The student's choice should figure prominently in the identity of the support person.

Policies and protocols should not presume that every student should have a support person present during the interviewing process or that any person of the student's choosing should be present during the interviewing process. Though policies should strongly endorse the use of support persons, there are circumstances where their presence may inhibit disclosure or affect its accuracy. Some policies contemplate that a student will be offered the

opportunity to have a support person either in the interviewing room or *just outside of the room*, depending upon need and other circumstances.³³

Case Coordinator

89. Where feasible, each school or school board shall designate from existing staff a "case coordinator" who will be specially trained and will assist any school employee or volunteer in fulfilling the obligation to report, may be responsible for ensuring that support structures are in place for students, and may act as liaison with children's aid societies and police. The coordinator should be someone who is comfortable with the issues involved and who is well acquainted with school board policies and protocols.

Counselling or Therapy

90. School boards bear the responsibility of ensuring that students who disclose sexual misconduct in the school setting have access to professional counselling or therapy. Boards should facilitate such counselling or therapy at the earliest opportunity following disclosure. Equally important, counselling or therapy should remain available throughout any investigation and legal process and as required thereafter. In some circumstances, such counselling should extend to family members.

Non-confrontation

91. A student who has reported sexual misconduct must not be required, other than as may be necessary in legal proceedings, to confront the suspected or accused person directly.

Some existing protocols suggest that students should be encouraged to make known his or her disapproval or unease to the alleged *harasser*, where appropriate. It is said that an individual may not realize that an action is offensive and a simple discussion may resolve the problem.

³³ See for example, Metropolitan Toronto *Child Sexual Abuse Protocol*, 3rd ed. (The Metropolitan Toronto Special Committee on Child Abuse, March 1995) at 38.

Generally, a student should *not* be expected to confront his or her harasser. Though there may be cases in which a student desires to discuss her harassment directly with her harasser, it is my view that a suggestion in protocols that a student should be encouraged to do so, even when limited to "appropriate" cases, is easily misinterpreted and problematic.

Of course, a student should never be expected to confront his or her *abuser*.

vi) Actions respecting the suspected employee or volunteer

Practices vary between school boards on how employees are dealt with, pending internal or external investigations or legal proceedings. Some boards provide that every teacher accused of sexual abuse must be removed from the classroom, pending investigation. Some boards regard this decision as discretionary, although teachers are, in most cases, removed from the classroom through reassignment to non-classroom duties under these circumstances. Removal from the classroom protects both students and teachers. A mandatory policy of removal is said to reduce speculation about the merits of each allegation as all teachers are treated equally. This is said ultimately to ensure fairness to teachers. Whichever approach is taken, it is clear that the paramount consideration must be the protection of children and the requirement that they not be exposed to a risk-laden situation.

Recommendations 92 to 95: Actions respecting the suspected employee or volunteer

92. School board policies and protocols should specifically address the actions to be taken by them pending a determination whether sexual misconduct has occurred.

93. Where a formal investigation of sexual abuse or harassment is to occur, school employees or volunteers should generally be removed from the classroom pending a determination whether sexual misconduct has occurred. A range of options, including suspension or re-assignment to non-classroom duties can be addressed.

94. An employee's reassignment or employment status should be revisited:

- (a) upon completion of any CAS/police investigation;**
- (b) after any criminal charges are laid;**
- (c) after any criminal case is completed; and**
- (d) upon completion of any internal investigation.**

95. School board policies and protocols should specifically state that the board needs to make a determination whether sexual misconduct has occurred, whether or not any criminal charges have resulted in findings of guilt.

Some existing policies and protocols provide for termination of employment upon findings of guilt in criminal cases or upon a determination, in the employment context, to a lesser standard of proof, that sexual abuse occurred. More problematic is what transpires after an acquittal in criminal proceedings. The interested parties with whom I met all understood that acquittals do not bar subsequent disciplinary proceedings. However, there was evidence presented to me that this understanding is not shared by all board representatives in Ontario. Misunderstandings as to the meaning and effect of acquittals persist. This recommendation addresses that issue.

vii) Communications subsequent to disclosure

Where school staff have been accused of sexual misconduct, particularly abuse of multiple students, other students and school staff, parents and the community may be deeply shaken. As well, speculation, gossip and innuendo may circulate, adversely affecting both the students and school staff directly involved. A communication plan avoids or reduces the adverse effects upon the school and its community and promotes fairness to all parties.

Recommendation 96: A communication plan

96. School board policies and protocols should specifically create a communication plan subsequent to disclosures of alleged sexual

misconduct by school employees or volunteers. Such a plan should address the following matters:

- (a) what information will be communicated, when and by whom;**

The protocols should also establish what authorizations need to be obtained from school supervisors before communications take place.

- (b) respect for the privacy rights of affected parties, to the extent possible;**

- (c) the need for factual accuracy and fairness to all affected parties;**

- (d) the desirability of affirming or supporting students who disclose sexual misconduct, while maintaining the presumption of innocence.**

Policies and protocols may also provide for the use of specialists in sexual abuse to implement a school's action plan, where the size of the board and resources permit.

E. Barriers to Full Disclosure Facing Prospective Employers

When discussing "prevention" strategies, I noted the information necessary to verify an applicant teacher's suitability for employment, by, for example, reference checks. However, the evidence presented to this review establishes that certain barriers may prevent prospective employers from obtaining full and accurate information from references:

- (a) material facts have never been documented or documentation has not been retained;**
- (b) the former employer perceives, incorrectly, that privacy legislation prevents disclosure of material facts; or**

- (c) the former employer was a party to a settlement with the teacher that compels non-disclosure or limited disclosure of material facts to a prospective employer.

Each of these barriers needs to be examined.

i) Availability of Documentation

School board policies and protocols should ensure that proper documentation is made of important events, including complaints of sexual misconduct against school employees, reports made to children's aid societies, police or internally, any investigations and their results. Disciplinary or other measures taken by the school board, including reprimands or cautions, should also be documented. This much appears indisputable.

The real issue appears to be the extent to which the information in these records, if not the records themselves, should be accessible, in particular, to prospective employers and for how long these records should be retained.

Some collective agreements now in force in Ontario allow for the removal of documentation from a teacher's employment file after as little as six months. Others do not regulate the retention of information in a teacher's employment file. In either case, counsel for teachers' associations note that a teacher should not be permanently burdened with matters that were either proven to be unfounded or which did not result in the teacher's dismissal or loss of certification. They point out that arbitrators recognize the limited value of a stale-dated disciplinary record and that permanent access to such information provides a disincentive to improvement or rehabilitation.

On the other hand, it is contended that the accumulation of complaints of sexual misconduct, even if unsubstantiated, may defy coincidence and compel a closer examination of the teacher. Or, conduct that was equivocal, in isolation, may acquire new meaning when viewed in the light of similar conduct committed at another time or place.

My recommendations address these countervailing concerns.

Recommendation 97: Documentation

97.1 School board policies and protocols should specifically address the making and retention of records pertaining to complaints of sexual misconduct committed by school employees or volunteers. Components of such policies are contained in the recommendations that follow.

97.2 Proper documentation should include details respecting any initial complaint or disclosure; any report made to a children's aid society, police, the College of Teachers or within the school board; correspondence relating to the complaint; notes or other documents relating to any internal investigation, including interview notes or tapes; the results of any internal or external investigation or legal proceedings; and any disciplinary or other measures taken by the school board, including reprimands or cautions.

97.3 Note-taking on interviews should be factual and detailed. A particular effort should be made to accurately record the complainant's own words.

97.4 Policies and protocols may address, sometimes in conjunction with collective agreements, retention periods for documents to prevent "unfounded" allegations from prejudicing a school employee. Otherwise, documentation respecting substantiated, unsubstantiated or unresolved complaints of sexual misconduct should be retained in the employee's personnel file indefinitely and should not be the subject of collective agreement provisions setting limited periods of retention.³⁴

97.5 Measures should be taken to ensure that the confidentiality and privacy interests of students or informants in cases of alleged sexual misconduct are preserved, to the fullest extent possible. This means, for example, that their names or information that may identify them should

³⁴ The term "substantiated" means that sufficient evidence has been found to support the allegation. The term "unsubstantiated" means that sufficient evidence has not been found to support the allegation and it cannot, therefore, be determined whether the allegation is true or not. The term "unfounded" means that there is no credible basis to believe the allegation: *New York City, Final Report of the Joint Commission of the Chancellor and the Special Commissioner for the Prevention of Child Sexual Abuse*, (New York: Commission, 1994) at 5.

generally not be disclosed to prospective or new employers and may be edited out of personnel records. Policies and protocols should provide for the retention of unedited information in a separate file and for the location of that file.

ii) Privacy Legislation

Various interested parties suggested that provincial or municipal freedom of information and privacy legislation inhibits school boards from disseminating full and frank information about their former employee to a prospective employer.

I have not embarked upon an exhaustive analysis of the relevant privacy legislation. However, I do not read the *Ontario³⁵* or *Municipal³⁶* *Freedom of Information and Protection of Privacy Acts* as applying to, or limiting the disclosure of, information about a teacher contained in his or her personnel file to another school or school board considering the teacher's application for employment. Surely, this is precisely what is contemplated by reference checks. Misleading disclosure or non-disclosure of material information about the teacher entirely undermines the verification process and potentially places students at risk. If I am wrong as to the law, a legislative amendment is called for.

Again, this does not mean that the confidentiality and legitimate privacy interests of complainants, witnesses or informants should or need be undermined.

iii) Resignation Settlements

School boards and teachers' unions should not be permitted to negotiate the resolution of sexual misconduct cases through agreement that a suspected teacher will resign upon a condition that the school board will not fully disclose the circumstances surrounding the resignation to any prospective employer seeking a reference.

³⁵ R.S.O. 1990, c. F.31, as amended.

³⁶ R.S.O. 1990, c. M.56, as amended.

Such a disposition would result in the removal of the suspected teacher from the affected school board, without having to prove the misconduct. The teacher's removal, had arbitration proceedings ensued, might have been far from certain. Indeed, the teacher may already have been acquitted in criminal court. The financial savings are undoubtedly substantial. Further, the school boards maintain that a prospective employer's own suspicions are easily triggered when the affected school board is prepared only to confirm that the teacher was indeed employed by the board.

Obviously, such an agreement must confer some benefit on the teacher. That is, the teacher must have a reasonable expectation that he or she will be able to secure new employment if the circumstances surrounding his or her resignation are not made known. The new employment could be as a teacher elsewhere or in another job involving children. In jurisdictions where the need for teachers is great, there is little assurance that full references will be provided, fully checked or that, if checked, the prospective employer's suspicions will be aroused.

As I noted earlier, counsel for the school boards and teachers' unions with whom I met understood that an agreement by the school board not to notify the College, where notification was required, was contrary to public policy and unlawful. Accordingly, this problem has already been partially addressed by my recommendation that disclosure be made to the College of the circumstances surrounding any such resignation. However, disclosure to the College may not ultimately affect the teacher's certification for any variety of reasons. The fundamental concerns remain. In my view, this very difficult issue must be resolved in favour of protecting students from future sexual misconduct.

Recommendation No. 98: Resignations and full disclosure

98.1 School board policies and protocols should specifically address resignations and the need to provide full and frank references upon request. The components of such a policy are contained in the following recommendations.

98.2 Personnel files of all employees must reflect the circumstances surrounding any resignation from employment relating to allegations of sexual misconduct. The content of these files should respect the confidentiality and privacy interests of students and informants.

98.3 Policies and protocols should specifically address the physical location and transfer of these personnel files or the information contained therein to an employee's new school or school board.

98.4 School boards should provide full and frank references to prospective employers, upon request. No resignation of an employee will be secured by agreement not to disclose facts relating to allegations of sexual misconduct to a prospective employer. Policies and protocols may differently address "unfounded allegations".

F. Financial and Other Resources

Earlier in this chapter, I reflected that the adequate education and training of prospective and current teachers, other school staff and volunteers, students and parents on sexual abuse and harassment require financial and other resources to ensure that educational programs are available and comprehensive.

A number of my recommendations do not involve the expenditure of funds. However, some of my recommendations undoubtedly have financial implications and I have been mindful of that throughout. Indeed, the section of the Report that immediately follows is designed to facilitate the development of policies and protocols by school boards and, perhaps, to thereby reduce, though not eliminate, the time and expense associated with that process. However, as I later note, the development of protocols is a healthy and desirable process that builds consensus and partnerships and which should not be bypassed.

It is not surprising that various interested parties, particularly school boards, made their financial concerns known to me during this review. For example, several parties reflected that a policy which prevents school boards from agreeing to limit disclosure to a prospective employer about a teacher who has resigned may well involve them in additional litigation which they can ill afford. Similarly, the responsibility of school boards to ensure that victimized students obtain counselling or therapy raises monetary concerns. Of course, these concerns form part of the very public debate over the adequacy of public funds allocated by the provincial government to education.

It is not within my mandate to resolve these larger issues, nor could I begin to do so based upon the limited information provided to me. However, I can say this. The safety of our children must be one of Ontario's highest priorities. The recommendations contained in this Report are, in my view, important and necessary to ensure that our children are protected and safe, particularly when these recommendations are seen in the larger context of policies that seek to create a school environment free from violence, abuse, harassment and discrimination generally. The Government of Ontario ultimately bears the responsibility of ensuring that this important objective is realized.

Recommendation 99: Financial resources to implement objectives

99. The Government of Ontario ultimately bears the responsibility of ensuring that financial and other resources are available to achieve the important objectives of protecting our children and ensuring a school environment free from violence, abuse, harassment and discrimination.

G. How to Develop Policies and Protocols on Sexual Misconduct

In this chapter and throughout the Report, I have identified problem areas that should be addressed through school board policies and protocols as well as recommended components of such policies.

Each school board is in a different position to respond to these recommendations. Some boards already have extensive policies that can be modified to meet the concerns expressed in this Report. A number of school boards have skeletal or no policies on topic and should now develop such policies.

This Report is designed to facilitate the development of new or modified policies on sexual misconduct by school employees and volunteers. This chapter ends with an extensive checklist of topics that should or might be addressed in such policies. Brief commentary is provided to many of these topics. As well, page references to where these topics are more fully addressed in the Report are also provided.

I have also chosen to reproduce in the appendices parts of the following existing policies and protocols:

(a) Sault Ste. Marie

Huron-Superior Catholic District School Board Policy No. 8000, *Child Abuse Policy and Procedures* approved June 8, 1999, including *Child Abuse Protocol between the Children's Aid Society of Algoma/Children's Aid Society of Sudbury-Manitoulin and the Algoma District School Board/Huron-Superior Catholic District School Board* dated March 29, 1999 (Appendix G-1)

Huron-Superior Catholic District School Board Policy No. 7002 *General/Sexual Harassment Policy* approved Feb 16, 1999 (Appendix G-2)

Memorandum of Understanding With Respect to Disclosure and Exchange of Information dated January 13, 2000. (Appendix G-3)

(b) Toronto

Toronto District School Board Policy C.07, *Dealing With Abuse and Neglect of Students* approved October 27, 1999 (Appendix H-1)

Excerpts, Toronto District School Board Procedure 001, *Dealing With Abuse and Neglect of Students* approved October 27, 1999 (Appendix H-2)

Excerpts, *Child Sexual Abuse Protocol, 3rd ed.* dated March, 1995 (Appendix H-3)

The Sault Ste. Marie policies and protocols apply to the schools at which DeLuca taught and reflect the lessons learned from that case. Toronto's approach provides an important, and different, perspective. All of the relevant policies and protocols of these school boards have not been reproduced.

These school boards are to be commended for their commitment to addressing the problem of sexual misconduct by school employees and school volunteers. While I do not necessarily adopt every component of these policies, it is clear that each policy has been the subject of extensive consultation and thought. Other Ontario school boards have shown a similar

commitment and are also to be commended. However, space does not permit me to reproduce those policies as well.

The Toronto District School Board has indicated that its existing policies have been informed by changes in the duty of the Board and its employees to detect and report abuse and neglect, by the possibility of stricter civil liability for harm inflicted by employees or volunteers, and by the convening of this review. Hopefully, this Report will motivate other school boards to develop meaningful new policies on sexual misconduct or to significantly revise existing policies.

The recent amendments to the *Child and Family Services Act* provide further impetus for reform. These amendments will require immediate revisions in policies and procedures and in the training of school staff. As well, it is anticipated that many new teachers will be hired in the next year or two. All of this makes reform timely and important.

School boards should not feel wed to existing policies or protocols. Variations in protocols between different school boards is to be expected. What might be appropriate for Toronto may not be appropriate for rural, northern or smaller communities.

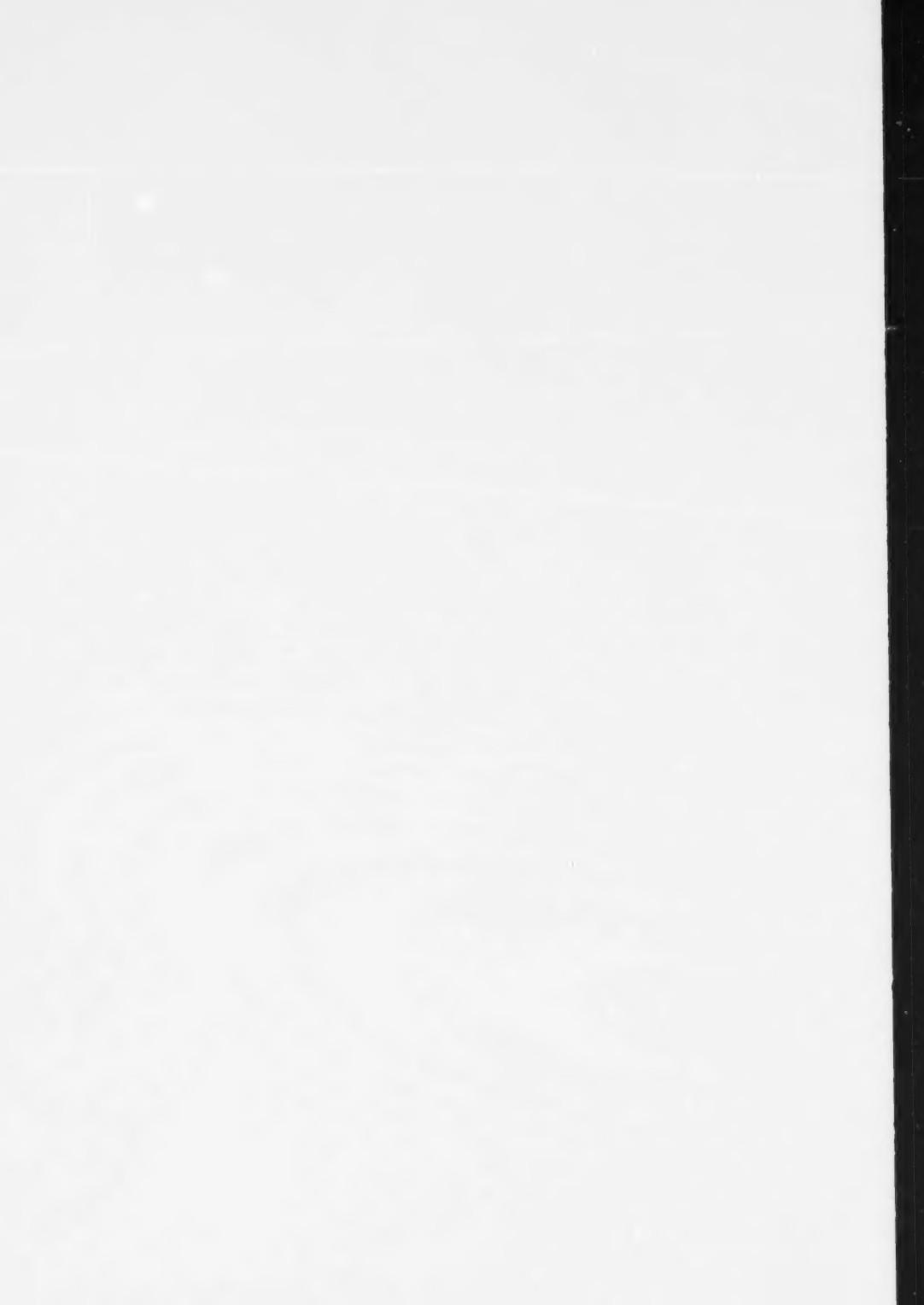
Policies and protocols to identify and prevent sexual misconduct by teachers and others may, and, indeed should, be established within larger initiatives to create a school environment free from violence, abuse, harassment and discrimination. These initiatives could address student-to-student or student-and-teacher activities, as well as a wide range of conduct, including physical abuse and harassment unrelated to sexual misconduct. The integration of policies and protocols on sexual misconduct with other policies can be accomplished in a variety of acceptable ways. Similarly, sexual abuse as well as other sexual misconduct can be addressed in one document or in two. What is important is that *all* kinds of sexual misconduct be addressed. The development of policies that ignore sexual harassment short of abuse would be misguided.

The process of developing policies is enhanced by close collaboration with many stakeholders. Policy development planning committees or task groups addressing these issues may draw upon trustees, directors of education, superintendents, principals, teachers and their association representatives, school advisory councils, community groups and parents,

students, survivors' groups, aboriginal groups and resource centres, police, children's aid societies, legal counsel, experts in child sexual and physical abuse and in the special needs of children with disabilities. The process itself is a valuable one. The partnerships and discussions that will evolve at meetings build consensus and ultimate acceptance of the new policies. Indeed, the recommendations and the checklist attached to this chapter already reflect the views of many stakeholders, as do the policies reproduced in the appendices. To further facilitate the development of new policies, I understand that this Report will be available electronically.

Recommendations 100 to 101: Development of policies and protocols

- 100. The development of school board policies and protocols on sexual misconduct by school employees and volunteers should, at least in part, be informed by the checklist of topics, together with commentary appended to Chapter VI of this Report.**
- 101. The Ministry of Education, in cooperation with Ontario school boards, should review, on a periodic basis, the development of school board policies and protocols across the province respecting sexual misconduct by school employees and volunteers and the implementation of such policies.**



Checklist: Sexual Misconduct Policies and Protocols¹

Subject matter	Comments	References
1. Policy Statements		
Commitment to providing students with safe and nurturing environment		See Policies of the Toronto District School Board and the Huron-Superior Roman Catholic District School Board, Appendices G and H-1
Devastating effects of sexual misconduct	may include illustrations	
Special role of school board, schools or educators		
Zero tolerance for sexual abuse or harassment of students		
Purposes for which policies are designed	may include: protecting students through prevention; promoting early identification; ensuring fair investigation and evaluation; protecting students from further harm; recognizing and complementing existing laws	Rec. 49.2, p. 293
Commitment to education and training on these policies		Rec. 56 - 60, pp. 302 - 304
Commitment to periodic review, evaluation and improvement of policies and practices	may specify annual review	Rec. 51, p. 293
Commitment to make resources available		Rec. 61, p. 305

¹ References are to key recommendations contained in Chapter VI. For further information please refer to commentary on recommendations, other chapters, and sample policies and protocols in Appendices G and H.

Subject matter	Comments	References
2. Codes of Conduct	what is acceptable and unacceptable behaviour of employees and volunteers towards students	
general duty of employees and volunteers to respect the sexual integrity and security of students	may refer to <i>Education Act</i> ; <i>Teaching Profession Act</i> , <i>Ontario College of Teachers Act</i> , 1996 and College's <i>Code of Ethics</i> , or <i>Ontario Human Rights Code</i>	Rec. 70.1, p. 311
<i>Prohibited Conduct</i>		
Definition of sexual misconduct	should also include general statement that sexual abuse and harassment are unlawful, sometimes criminal; constitute professional misconduct for College members; and cause for employment discipline	Rec. 70.3, p. 311
Definition of sexual abuse	should include <i>Criminal Code sections</i> ² , <i>Child and Family Services Act</i> definition, commentary and illustrations	Rec. 70.3(a), p. 311
Sexual relationships with students of any age or former students under 18 or conduct directed to establishing such relationships	should reinforce that, in most cases, this is sexual exploitation/abuse under <i>Criminal Code and CDSA</i> ; may also prohibit relationship with former student for fixed period	Rec. 70.3(c), p. 313

² Sections may be reproduced in an appendix or separate document.

Subject matter	Comments	References
Definition of sexual harassment	may include <i>Ontario Human Rights Code</i> sections; ³ should include commentary (modifying OHRC definitions) and illustrations	Rec. 70.3(b), p. 312
Definition of related unacceptable activities	should outline the considerations in evaluating the propriety of such conduct; should include illustrations	Rec. 71, p. 316
Threats or reprisals	should also state duty of board to protect complainants, witnesses or informants from threats or reprisals; should reflect employment consequences of such conduct and that threats or reprisals may also constitute crimes and/or OHRC infringements	Rec. 81, p. 326
Application of code: who it applies to; where it applies	should include school employees and volunteers; ⁴ extends beyond in-school conduct.	Rec. 70.2, p. 311 See also pp. 310-311

3. Procedures for Responding to Known or Suspected Sexual Abuse

Receiving Disclosure

Basic do's and don'ts when disclosure is made	for example, do not make promises respecting confidentiality that cannot be kept; do not interrogate the student; do not compel student to confront implicated employee or volunteer	Rec. 73, p. 318 Rec. 91, p. 335
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³ Same as above.

⁴ One protocol refers to employees and representatives of the school, to include student teachers, college students on placements and volunteers.

Subject matter	Comments	References
<i>Reporting to Police/CAS</i>		
Duty to report to CAS where employee or volunteer reasonably suspects sexual abuse of student under 16 ⁵	should include <i>CFS4</i> sections; ⁶ analysis of the criteria for mandatory reporting; should provide local CAS telephone numbers	Rec. 74, 75.1, p. 320
Duty to report directly to CAS; non-delegation	should include <i>CFS4</i> section; may include right to have principal/designate present to facilitate reporting; may provide for a "case coordinator" to assist in reporting obligation and in school board involvement thereafter	Rec 75.4, p. 321
Duty is ongoing	should include <i>CFS4</i> section	Rec. 75.5, p. 321
Duty supersedes confidential or privileged disclosure	should include <i>CFS4</i> section	Rec. 75.6, p. 322
Liability of professionals for failure to fulfill duty	should include <i>CFS4</i> section; also may constitute professional misconduct for College members and cause for employment discipline	Rec. 75.3, p. 321
Legal protection for persons reporting	should include <i>CFS4</i> section; may also specifically prohibit employment reprisal for reporting	Rec. 75.6, p. 322

⁵ Or ward of CAS under 18.⁶ Sections may be reproduced in an appendix or separate document.

Subject matter	Comments	References
Where employee or volunteer reasonably suspects sexual abuse of student 16 or over, reporting should be done to the police	should discuss effect of student's decision not to cooperate with police and greater obligation to protect all children and students; should address obligation to report to CAS, despite student's age, where teacher has access to younger students; should also provide local police telephone numbers	Rec. 76, p. 322
Informing suspected employee or volunteer of report to be made or just made; inapplicability of s.18(1)(b) of the <i>Teaching Profession Act</i> regulation	may limit informing suspected employee or volunteer until instructions obtained from CAS/police; should clarify that s.18(1)(b) is inapplicable	Rec. 80, p. 325
Uncertainty whether to report to CAS/police	may provide that any uncertainty ultimately to be resolved in favour of reporting; may provide for contacting specific resource people (with telephone numbers) for advice about reporting ⁷	See commentary at p. 320
Keeping a record of the report	should refer to a standardized form (e.g. Record of Report to CAS/Police); may provide guidance as to content of report; should address where the report and copies will be kept; may reflect that CAS/police should be sent a copy	Rec. 97.1, 97.2, 97.3, p. 340

⁷ Some policies suggest contacting CAS without disclosing names.

Subject matter	Comments	References
Addressing immediate issues relating to child's best interests with CAS/police	<p>should provide examples of matters to address: will the student be interviewed and when? where? should parents be contacted? if so, how and when? what information can be shared with parents or student? All of these matters may be elaborated upon in joint CAS/police/school board protocols</p> <p>NOTE: For older students, parents will not be notified unless the student consents</p>	Rec. 77, p. 323
<i>Internal Reporting</i>		
Person who receives disclosure must promptly report to principal/designate	<p>should also provide for alternative if principal/designate is implicated; may also provide that any employee or volunteer must advise principal/designate when charged with certain crimes or when informed or aware that another employee or volunteer has been charged; should provide for further reporting chain from principal/designate to superintendent to director to board</p>	Rec. 78, p. 324

Subject matter	Comments	References
<i>CAS/Police Investigation</i>		
How CAS/police investigation will be conducted	Interagency protocols should address the relative roles of CAS and police; the timing of the investigation; timing of contact with parents; interviewing techniques; specialized investigators; early videotaping of student interviews; medical examinations; the obligation of principal/designate to advise CAS/police when student transfers schools; the exchange of information between CAS, police and the school board; may address what information should be provided to the suspected party or counsel to enable a response to the allegations being investigated.	Rec. 84 p. 330
Cessation of internal investigation by school pending ongoing CAS/police investigation	should specifically caution against interviewing of student or suspected employee/volunteer; may articulate dangers (potential effect on CAS/police investigation or on student)	Rec. 84(l), p. 331 Rec. 85.1, p. 332 Rec. 85.2, p. 333
Location of interviews conducted	should address factors affecting the location of interviews, particularly whether CAS/police interviews can or should be conducted on school premises	Rec. 84(c), p. 330
Obligation to contact CAS/police if not apparent that investigation has commenced	should provide that principal/designate must ascertain case status, if no apparent action being taken to investigate	Rec. 84(m), p. 332

Subject matter	Comments	References
<i>Support for Student After Reporting</i>		
Designating support person	should address the presence of support persons during interviews and the availability of school staff to remain with students until CAS/police interviews, if imminent, or if students are otherwise in need of support	Rec. 84(n), p. 332 Rec. 87, p. 334 Rec. 88.1-88.2, p. 334
Designating a school board employee to coordinate with CAS/police and assist the student	may provide for response team and/or social worker or student services worker or case coordinator to be contacted, depending upon size of board and resources; same person may be chosen by student to act as support person throughout	Rec. 88.3, p. 334 Rec. 89, p. 335
Counselling for student and, if applicable, family members	should provide for appropriate counselling or therapy throughout the investigation, any legal proceedings and thereafter; in a limited number of cases, counselling for staff and students generally may be required (e.g. multiple victims case)	Rec. 90, p. 335

Subject matter	Comments	References
<i>Actions respecting the suspected employee or volunteer</i>		
Alternate assignments or employment status for suspected teacher during investigation	may provide for standard action or a range of actions (e.g. change in work location, suspensions with or without pay); should provide generally for removal from classroom pending investigation for student safety and teacher's protection; should provide that employee be notified on how to obtain legal advice through his or her association	Rec. 92-93, p. 336
Alternate assignments or employment status revisited (a) upon completion of CAS/police investigation (b) after charges laid and (c) after criminal case completed	may specifically provide for termination, upon finding of guilt in criminal case or a determination, in employment context, to a lesser standard of proof that abuse occurred; should specifically state that a determination needs to be made, notwithstanding acquittal	Rec. 94-95, p. 337

Subject matter	Comments	References
<i>Communications subsequent to disclosure</i>		
Communicating with staff, students, parents and community about status of case and employee/teacher	should address what information will be communicated (existence of criminal charges, status of accused in school etc.) and by whom; should emphasize privacy rights, need for factual accuracy and fairness to affected parties; may involve meetings with parents; should provide for authorization to be obtained for communications and from whom; may provide for use of specialists in sexual abuse to implement action plan, where size of board or resources permit; should recognize both the desirability of affirming/supporting student and maintaining the presumption of innocence	Rec. 96, p. 337
4. Procedures for Responding to Known or Suspected Sexual Harassment (or Misconduct Short of Abuse)		
General duty to intervene to protect students from being the victims of sexual misconduct		Rec. 79.1, p. 324
<i>Receiving Disclosure</i>		
basic do's and don'ts when disclosure is made	for example, do not make promises respecting confidentiality that cannot be kept; do not interrogate the student; do not compel student to confront implicated employee or volunteer	Rec. 91, p. 335

Subject matter	Comments	References
Documenting disclosure	should refer to a standardized form; may provide guidance as to content of report (factual, no speculation etc.); should address where the report and copies will be kept;	Rec. 97.1-97.3, p. 340
<i>Internal Reporting</i>		
Where employee or volunteer reasonably suspects sexual harassment or other misconduct, short of abuse, obligation to report to principal/designate	should provide for further reporting chain from principal/designate to superintendents to directors to board, depending upon the nature of the conduct; see the comments immediately below	Rec. 79.2 - 79.3, p. 324
<i>Informal Resolution</i>		
Scope for informal resolution	should reflect that <i>some</i> behaviour can be addressed informally and resolved through discussion or teacher counselling; should provide illustrations	Rec. 79.4, p. 325
<i>Supporting the Student</i>		
Designating support persons	should address the presence of support persons during interviews and the designation of school employees as support persons; may provide that social worker or student services worker or case coordinator involved, depending on size of board and resources	Rec. 84(n), p. 332 Rec. 87, p. 334 Rec. 88.1, p. 334 Rec. 88.3, p. 334

Subject matter	Comments	References
Counselling for student and, if applicable, family members	should provide for appropriate counselling or therapy throughout the investigation, any legal proceedings and thereafter; in a limited number of cases, counselling for staff and students generally may be required NOTE: where sexual harassment has caused serious emotional harm or a risk that such harm is likely, sexual abuse protocol applies	Rec. 90, p. 335
<i>Actions respecting the suspected employee or volunteer</i>		
Alternate assignments or employment status for suspected teacher during investigation	may provide for a range of actions depending upon the nature of the conduct alleged	Rec. 92 - 93, p. 336
Alternate assignments or employment status revisited upon completion of internal investigation		Rec. 94(d), p. 337
<i>Communications subsequent to disclosure</i>		
Communicating with staff, students, parents and community about status of case and suspected teacher/volunteer	should address what information will be communicated and by whom; should emphasize need for factual accuracy and fairness to affected parties; may involve meetings with parents; should provide for authorization to be obtained for communications and from whom;	Rec. 96, p. 337
5. Students with Disabilities	should specifically recognize and address special needs that arise in implementing policies	Rec. 84(g), p. 331

Subject matter	Comments	References
6. Internal Investigation	should outline the procedures that govern internal investigations, when they are to take place	Rec. 84(l), p. 331 Rec. 85.1, 332 Rec. 85.2, p. 333 Rec. 86, p. 333
7. Documentation Documenting school/school board involvement and retention and use of documents	should address points at which actions are to be documented: disclosure or suspicions of misconduct; referral to CAS/police and subsequent contact with CAS/police, if applicable; presence at interviews; ongoing observations; summary of investigation (internal or external) and any disciplinary measures taken; may address retention period of documents (sometimes in conjunction with a collective agreement); should address editing of records to protect confidentiality of student or informant; should also provide for retention of unedited information in separate file and location of that file; may draw distinctions between retention of information pertaining to unfounded v. substantiated or unsubstantiated allegations	Rec. 97, p. 340

Subject matter	Comments	References
8. Reporting to College		
The obligation of the board to report to the College under specified circumstances	should include circumstances where board becomes aware of relevant criminal charges or findings of guilt; where there are disciplinary measures taken or resignations relating to sexual misconduct; should reflect legal right of school board to provide full information to College; should include relevant <i>College of Teachers Act, 1996</i> sections	Rec. 82, p. 328
The obligation of principals and supervisory officers to ensure that Board can fulfill its obligation		Rec. 83, p. 328
9. Confidentiality		
Measures to ensure that confidentiality and privacy interests of affected parties are respected, to the extent possible		Rec. 52.2(e), p. 301 Rec. 85.2(b), p. 333 Rec. 96(b), p. 338 Rec. 97.5, p. 340 Rec. 98.2, p. 342
10. Detecting Sexual Misconduct		
Possible indicators of sexual misconduct	should include behavioural and physical signs in children and some behaviour associated with adults who abuse children (e.g. grooming activities); should remind reader of limitations upon the use of these indicators	Rec. 52.2(d), p. 301

Subject matter	Comments	References
11. Screening of Teaching Applicants and Reference Checks^a		
Compulsory criminal and disciplinary checks	should apply to every applicant for employment or transfer; should also require verification that the applicant is a member of good standing with the College	Rec. 63, p. 307
How screening is to be conducted	should require a comprehensive and standardized application form, a thorough interviewing process and verification of information, including but not limited to checks of all references; content of form should be addressed, as should obtaining a consent to verify information and to conduct criminal record checks;	Rec. 62, p. 307 Rec. 64, p. 308 Rec. 65, p. 308
Verification of information	should reflect the purposes of the verification process and how they are to be realized	Rec. 66.1, p. 308 Rec. 66.2, p. 309
Confidentiality	should state the need to respect the privacy and equality interests of applicants; limitations on queries should be explored	Rec. 66.3, p. 309
No offer of employment until full investigation has been completed		Rec. 67, p. 309
Who should be screened	in addition to employees, should identify which types of volunteers	Rec. 68-69, p. 309

^a This section has application beyond the screening of sexual perpetrators. It may be included in a separate policy or protocol.

Subject matter	Comments	References
The duty to provide full and frank references upon request	should reflect that legislation does not prevent candour by references; should also reflect that misleading statements or withholding important facts undermines the verification process	Rec. 98.1, p. 342 Rec. 98.4, p. 343
12. Resignation Settlements		
Limitation upon settlements secured by agreement not to disclose facts relating to allegations of sexual misconduct to prospective employer	may treat unfounded allegations differently	Rec. 98.4, p. 343
Content of personnel files of employees	should provide that circumstances surrounding any resignation from employment related to allegations of sexual misconduct must be included; should reiterate need for editing to protect confidentiality and privacy interests	Rec. 98.2, p. 342
Transfer of personnel information to new employer		Rec. 98.3, p. 343
13. Education and Training⁹		
Content of continuing education	should outline topics for inclusion; special needs students should be addressed;	Rec. 52.2, p. 300 Rec. 56, p. 302 Rec. 59.2 - 59.3, p. 304
Methods of delivery and frequency	should reflect age-appropriate education for students	Rec. 57, p. 302 Rec. 59.1, p. 304

⁹ This section has application beyond the screening of perpetrators of sexual misconduct. It may be included in a separate policy or protocol.

Subject matter	Comments	References
Who should be educated	should include staff, students; should also be available for volunteers and parents	Rec. 56.1, p. 302 Rec. 58, p. 303 Rec. 60, p. 304



CONCLUSION

When all is said and done, this review is about protecting students – protecting them from sexual misconduct and its devastating consequences – protecting them when they reach out for help – protecting them from all that the DeLuca victims suffered – and protecting them from those teachers who abuse their trust.

Sexual abuse and harassment is not a problem unique to the schools in which DeLuca taught. Unhappily, as the many criminal and disciplinary cases referred to in this Report reveal, in recent years, sexual misconduct scandals have struck many schools, as well as other organizations that, like schools, have long traditions of providing services for children.

The problem has been created by a small but significant number of teachers. The vast majority of teachers have earned the trust bestowed upon them by students and the community. Teaching is, after all, the noblest of professions. Teachers provide our children with the tools to learn and grow. Teachers who abuse also teach our children. But those lessons – of loss of safety and misplaced trust – are painful ones. Ones they should never have been taught.

For the courageous survivors of DeLuca's abuse, history cannot be rewritten. They have been doubly victimized. First, by DeLuca. Second, by the deeply disturbing and harmful way their complaints were dealt with. Their schools were not safe havens; they were scenes of a crime.

And for many, it was avoidable. Had complaints not been minimized or discounted, had they been received with openmindedness; had their disclosures been evaluated, free from stereotypical notions about students, teachers and sexual abuse, had their pleas been investigated or even documented, some would have been spared. Instead, DeLuca was passed from school to school.

It is not that policies and protocols went unheeded. There were none.

If no lessons are learned from the DeLuca case, then his survivors will have been victimized yet again.

The problem is real. It must be addressed. Through a proactive, comprehensive effort that attacks every facet of the problem: the education and training of new and established teachers; a full and mandatory screening process for applicant teachers; full and frank disclosure between new and old employers; codes of conduct that clearly spell out unacceptable behaviour and leave no doubt that they will be enforced.

These and other approaches are designed to *prevent* sexual misconduct by school staff and volunteers. However, there is no foolproof profile of sexually abusive teachers. No preventative measures can completely immunize a school from them. So, measures must be taken to detect sexual misconduct, where it occurs, and intervene. Policies and protocols that state how sexual misconduct may be better detected, how complaints are to be dealt with, how students can be supported, and how allegations should be investigated, represent some of the problem areas identified and addressed in this Report.

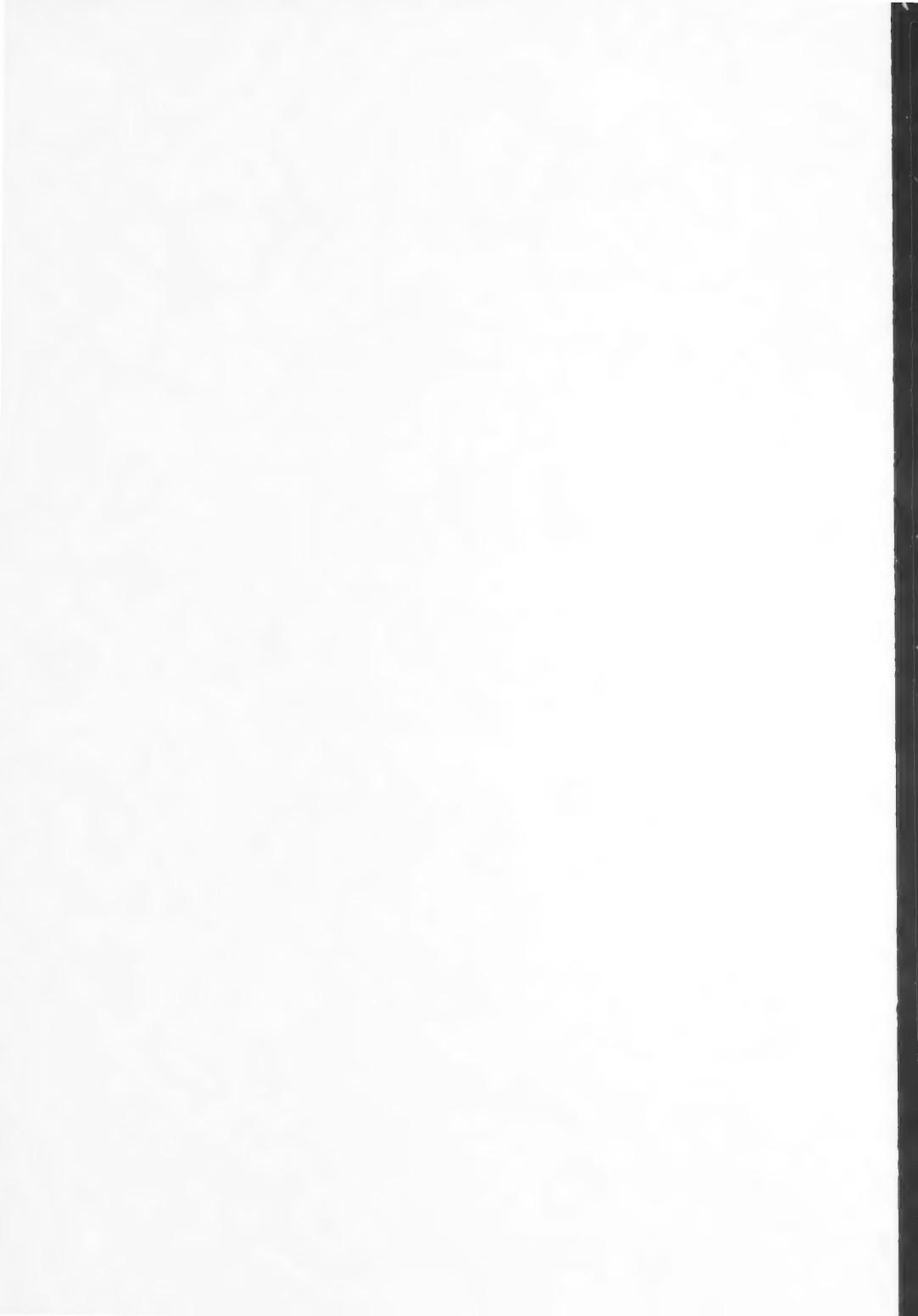
My recommendations also address the legal process that follows investigation. To foster an environment that encourages and supports truthful disclosures of sexual misconduct, it is necessary that students be treated with due regard for their dignity and legitimate privacy interests, that adjudicators remain mindful of the potentially devastating effects of the legal process upon students, particularly young children, and that their evidence (and that of all witnesses) be evaluated free from the stereotypical notions that infected the DeLuca case.

I am mindful of the concern of educators that a heightened sensitivity to sexual offences may inhibit an appropriate nurturing relationship and deprive children of the warmth and compassion of those who educate them. I am also mindful of their concern about false allegations and the terrible damage such accusations can cause. These concerns cannot be entirely alleviated. However, policies and protocols that are clear, balanced and known to all are likely not only to protect children, and reassure the community, but also promote fairness to teachers and enhance the school environment.

There is cause for hope. Great strides have been made in Sault Ste. Marie. A number of school boards have committed themselves to address these issues. Educators do not want sexual predators in their midst. The challenge is to recognize the problem and work together to address it.

The Government of Ontario must also meet the challenge. Resources need to be available to ensure the safety and protection of our children. What could be more important to the future of those children than a school environment free from violence, abuse, harassment and discrimination – of any kind. My 101 recommendations are intended to facilitate such an environment.

The bottom line is this. Abusers belong in a courtroom, not a classroom. The challenge is clear. A course of action is proposed. The aim is compelling – protecting our students.



RECOMMENDATIONS

Recommendations 1 to 4: Orders of prohibition

- 1.** Ontario prosecutors should specifically be instructed on the existence and appropriate use of section 161(1)(b) of the *Criminal Code*. It may be advisable for the Ministry of the Attorney General to emphasize the importance of section 161(1)(b) in its Crown Policy Manual.
- 2.** In the circumstances outlined in section 161(1)(b) of the *Criminal Code*, sentencing judges *shall* consider making, and may make, an order of prohibition. Sentencing judges should be alert to the existence of section 161(1) and its use in appropriate cases.
- 3.** Evidence, medical or otherwise, that the accused is a pedophile or a demonstrable risk to children, while relevant, is not a precondition to the imposition of an order of prohibition under section 161(1)(b) of the *Criminal Code*. Where an order of prohibition is considered under section 161(1)(b) of the *Criminal Code*, a sentencing judge should be mindful of the potential emotional and psychological effect upon the well-being and security of children, should the accused seek, obtain or continue any employment or become a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 14 years.
- 4.** The Government of Ontario should support, through its ongoing consultations with the Government of Canada, amendments to section 161 of the *Criminal Code* to provide that:
 - (a)** it extend to an offender convicted or discharged on the conditions prescribed in a probation order under section 730, of an offence under subsections 153.1(1), 163.1(2) and 163.1(3) in addition to those offences presently listed in section 161, in respect of a person who is under the age of 14 years.

(b) where an offender is convicted or discharged on the conditions prescribed in a probation order under section 730, of an offence under section 153, subsection 153.1(1), 155 or 159, subsection 160(2), subsections 163.1(2) and 163.1(3) or section 170, 171, 271, 272, 273 or 280, in respect of a person who is under the age of 18 years, the court shall consider making and may make, subject to the conditions and exemptions that the court directs, an order prohibiting the offender from

seeking, obtaining or continuing any employment, whether or not the employment is remunerated or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 18 years.

Recommendation 5: “Persons in charge” under the *CDSA*

5. Consideration should be given to amending section 72 of the *Child and Family Services Act* to delete the requirement that suspected abuse be related to a “person in charge of a child”. Alternatively, it should be made clear that persons who are employed or are volunteers in a capacity that involves being in a position of trust or authority towards students or that involves unsupervised access to such students respecting school-related activities are persons in charge of those students for the purposes of section 72 of the Act.

Recommendations 6 to 8: Defining and sanctioning sexual misconduct

6.1 Section 1 of the misconduct regulation under the *Ontario College of Teachers Act*, 1996 should be amended to provide that professional misconduct includes “sexual misconduct”.

6.2 "Sexual misconduct" should be defined as "offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment".

7.1 The Ontario College of Teacher's Code of Ethics should further elaborate upon the meaning and content of "sexual misconduct".

7.2 The Code of Ethics should provide that:

(a) its members not engage in offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment ("sexual misconduct").

(b) "Sexual misconduct" includes, but is not limited to:

Sexual abuse

(i) conduct which would amount to sexual interference, an invitation to sexual touching, sexual exploitation, sexual exploitation of a person with a disability, an indecent act or exposure, or a sexual assault or other crime which may affect the personal integrity or security of any student or the school environment;

Sexual harassment

(ii) objectionable comments or conduct of a sexual nature that may affect a student's personal integrity or security or the school environment. These may not be overtly sexual but nonetheless demean or cause personal embarrassment to a student, based upon a student's gender;

Sexual relationships

- (iii) any sexual relationship with a student or a former student under the age of 18 and any conduct directed to establishing such a relationship.

8. The “Regulation Under the *Teaching Profession Act*” should be amended to specifically provide that a teacher owes a duty to his or her pupils to respect their sexual integrity and personal security.

Recommendation 9: Commentary to Code of Ethics

9.1 Commentary to the Code of Ethics should explain and provide illustrations (as has been done throughout Chapter IV of this Report) of the criminal and non-criminal manifestations of sexual misconduct.

9.2 The commentary should also dispel misconceptions about sexual misconduct which are commonly held or advanced in response to allegations of misconduct.

Recommendation 10: Proscribing other conduct

10.1 The Ontario College of Teachers Code of Ethics should state, in general terms, a member’s duty not only to avoid sexual misconduct but also to avoid activities which may reasonably raise concerns as to their propriety.

10.2 Each school board should, where desirable, refine these more general rules through their own policies and protocols to address issues of particular concern in their community.

Recommendation 11: Anti-reprisal provision in Code of Ethics

11. The Ontario College of Teachers Code of Ethics should specifically state that no member shall engage in, or threaten to engage in, reprisals against anyone who discloses, reports, or otherwise provides information with respect to alleged sexual misconduct.

Recommendation 12: Section 18(1)(b) of the "Regulation Under the Teaching Profession Act"

12. Section 18(1)(b) should be amended to clarify that the duty to inform a colleague about an "adverse report" does not apply to a report of suspected sexual misconduct.

Recommendation 13: Code of Ethics — Obligation to intervene in cases of suspected sexual misconduct

13. The Ontario College of Teacher's Code of Ethics should provide that all members of the College have a duty to protect students by intervening in cases of suspected or alleged sexual misconduct in accordance with the specific obligations articulated in this Report.

Recommendations 14 to 15: Obligation of school boards to notify the Ontario College of Teachers

14.1 Section 47 of the *Ontario College of Teachers Act*, 1996 should be amended to more clearly outline the circumstances under which school boards shall notify the Ontario College of Teachers.

14.2 Section 47(2) should be amended to require that a school board promptly notify the College in writing when the board becomes aware that a member who is or has been employed by the board:

has been charged with an offence under the *Criminal Code* (Canada) which, if proven, may amount to offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment.

14.3 Section 47(3) should be retained.

14.4 Section 47 should be further amended to add the following:

- (a) Where a school board dismisses, suspends or otherwise disciplines a member of the College in its employ for engaging in sexual misconduct, it shall promptly notify the College in writing of the disciplinary action, giving reasons.**
- (b) If a member of the College resigns during an investigation into allegations that the member engaged in sexual misconduct, a school board shall promptly notify the College in writing of the circumstances surrounding the resignation.**

15. The *Education Act* should be amended to provide that the duties of principals and supervisory officers include the obligation to promptly report to their school board information relevant to that board's obligation under section 47 of the *Ontario Teachers College Act, 1996*.

Recommendation 16: Providing school boards with decisions of the Ontario College of Teachers

16. The *Ontario College of Teachers Act, 1996* should be amended to state that the College is to provide a copy of the decision (and reasons) of the Investigations Committee, the Discipline Committee or the Fitness to Practise Committee to a school board where:

- (a) the decision of the committee relates to information provided by the school board under section 47 of the Act; or**

- (b) the decision of the committee relates to events that occurred while the member who is the subject of the decision was employed by the school board.

Recommendation 17: General approach to students as witnesses or sexual complainants

17. Administrative tribunals need to ensure that students who are witnesses or sexual complainants are treated with due regard for their dignity and legitimate privacy interests; that they remain mindful of the potentially devastating effects of the legal process upon these students; and that their evidence (and that of all witnesses) is evaluated free from speculative myths, stereotypes and generalized assumptions. These responsibilities are best discharged through an understanding and application of evidentiary and procedural rules which appropriately recognize and accommodate their interests in a way compatible with the interests of the adverse parties.

Recommendations 18 to 22: Admissibility of hearsay evidence in administrative proceedings

18.1 Hearsay statements may be admitted for the truth of their contents where their admission is reasonably necessary to the determination of a fact in issue, and where the circumstances surrounding these statements provide sufficient indicia of reliability.

18.2 In administrative proceedings, a lower threshold of necessity and reliability should be applied to the hearsay statements of witnesses, particularly in cases involving alleged sexual misconduct. This accords with the nature of these proceedings and the appropriate balance between competing interests.

18.3 A determination of reasonable necessity should be made with greater regard to the best interests of a child witness or sexual complainant. These interests include the need to avoid or reduce the detrimental impact of recounting sexual abuse in a legal proceeding.

This means that (i) the type and degree of emotional impact that is required to demonstrate reasonable necessity is diminished; and (ii) the type of proof required to establish impact is less exacting. Something less than “proof of *inability* or *unavailability* to testify” or “*psychological assessments* proving potential trauma or harm to the child” is therefore required in administrative proceedings.

19.1 In administrative proceedings, subject to a residual discretion to exclude, a testimonial statement should generally be admissible as evidence in the proceedings, without further proof where:

- (a) the party against whom the statement is sought to be introduced was a party to the proceedings in which the testimony was formerly admitted;
- (b) there is a substantial similarity between the material issues to which the statement was/is relevant in the former and present proceedings; and
- (c) there was an opportunity to cross-examine the witness at the former proceeding by the party against whom the statement is to be used.

A determination of reasonable necessity should not generally be a precondition to the admissibility of testimonial statements, given the level of reliability assured through cross-examination. However, a lack of reasonable necessity may inform the exercise of discretion.

20. The Rules of Procedure of the Ontario College of Teachers Discipline Committee should be amended to specifically address prior testimonial statements. Consideration should also be given to amending the *Statutory Powers Procedure Act* and the *Ontario Evidence Act* to similar effect. Arbitration boards acting pursuant to the *Labour Relations Act*, 1995 should also be guided by these evidentiary rules.

21.1 Section 17 of Form 6A, “Pre-Hearing Conference Memorandum”, of the Rules of Procedure of the Ontario College of Teachers Discipline Committee should be amended to specifically require consideration of

whether there is any need to hear *viva voce* evidence from a child witness or sexual assault complainant. The form should indicate:

- (a) whether an application will be brought to dispense with the need to hear from a witness *viva voce*;
- (b) alternatively, whether an application will be brought to accommodate a vulnerable witness through listed procedures; and
- (c) the respondent's position on such applications.

22. The undesirability of subjecting children or complainants in cases involving sexual misconduct to a multiplicity of proceedings in which they are to testify should figure prominently in an assessment as to whether their hearsay statements should be tendered as evidence, without further proof.

Recommendations 23 to 25: Previous findings of guilt

23.1 A Certificate of Conviction or Discharge is *prima facie* proof that the crime was committed and admissible as such in subsequent proceedings.

23.2 Where there have been findings of guilt, the specific findings of fact contained in reasons for judgment or reasons for sentence should be similarly admitted as *prima facie* evidence of those facts. Such findings of fact explain the finding of guilt and should be regarded as incidental to the Certificate of Conviction or Discharge. In some circumstances, transcripts of the criminal proceedings may also be properly used to explain the finding of guilt and should be regarded as incidental to the Certificate of Conviction or Discharge.

24. The Rules of Procedure of the College Discipline Committee should be amended to specifically address prior testimonial statements. Consideration should also be given to amending section 22.1 of the *Ontario Evidence Act* to similar effect. Arbitration boards acting

pursuant to the *Labour Relations Act*, 1995 should also be guided by these evidentiary rules.

25. The undesirability of subjecting children or complainants in cases involving sexual misconduct to a multiplicity of proceedings in which they are to testify should figure prominently in an assessment as to whether their testimony is needed in proceedings which follow a finding of guilt.

Recommendation 26: Findings of fact

26.1 Findings of fact, other than those which support a finding of guilt, may be treated as *prima facie* evidence of those facts, in the discretion of the administrative tribunal.

26.2 Factors which should inform the exercise of that discretion include:

- (a) the nature of the proceedings in which the findings were made;
- (b) the significance of the findings to the ultimate determination in the proceedings in which the findings were made;
- (c) whether the findings of fact were made on a balance of probabilities or beyond a reasonable doubt or otherwise;
- (d) whether the party against whom the findings were made was a party to the proceedings in which they were made;
- (e) whether the party against whom the findings were made had an opportunity to challenge the evidence upon which those findings were made;

- (f) whether the party against whom the findings were made was motivated to challenge the evidence upon which those findings were made, or the findings themselves.

Recommendations 27 to 30: Use of screens and related devices

27. Section 18.4 of the *Ontario Evidence Act* establishes a different threshold than criminal proceedings for the use of a screen or a closed-circuit television. Their use can be justified to protect the best interests of the child witness. The best interests of the child should include the avoidance or reduction of emotional or psychological distress associated with testifying in the presence of the adverse party or in a hearing room.

28. Rule 13.01 of the Ontario College of Teachers Rules of Procedure for the Discipline Committee should be amended to adopt the threshold test contained in section 18.4 of the *Ontario Evidence Act*.

29. Consideration should be given to amending section 18.4 of the *Ontario Evidence Act* to extend to vulnerable witnesses, rather than only young persons.

30. Parties tendering these witnesses should ensure that these witnesses are aware of the potential availability of screens or other devices or closed-circuit testimony in advance of the hearing and should explore their use with these witnesses in appropriate cases.

Recommendation 31: Use of appropriate hearing rooms

31. Parties tendering vulnerable witnesses and administrative tribunals are encouraged, in appropriate cases, to utilize hearing rooms which are designated to better accommodate these witnesses or to adapt existing hearing rooms to better accommodate these witnesses.

Recommendations 32 to 34: Use of support persons in Ontario College of Teachers discipline hearings

32. Rule 13.01(1) of the Rules of Procedure of the Ontario College of Teachers Discipline Committee should be amended to specifically address the availability of support persons for young persons under the age of 18 in conformity with the *Ontario Evidence Act*. The rule permitting otherwise vulnerable persons to testify with the assistance of a support person in the discretion of the Committee should remain.

33. Section 18.5 of the *Ontario Evidence Act* should be adopted and fully utilized in administrative hearings.

34. The party tendering such witnesses should ensure that those witnesses are aware of the potential availability of support persons in advance of a hearing.

Recommendation 35: Extension of victim-witness program

35. Consideration should be given to the extension of victim-witness programs to administrative proceedings.

Recommendations 36 to 37: Personal cross-examination

36. Section 18.6 of the *Ontario Evidence Act* should be adopted and fully utilized in administrative hearings.

37. Rule 13.10(4) of the Rules of Procedure of the Ontario College of Teachers Discipline Committee should be amended to adopt the threshold test set out in section 18.6.

Recommendation 38: Publication bans upon identity

38.1 The *Statutory Powers Procedure Act* and the *Labour Relations Act*, 1995 should be amended to specifically address publication bans upon the identity of affected persons and information that could disclose their identity. The Ontario College of Teachers Discipline Committee's Rules of Procedure should also specifically address such bans.

38.2 Such amendments should provide, *inter alia*, that:

- (a) publications bans are available, in the least, for witnesses or persons allegedly subjected to sexual misconduct relevant to the proceedings;
- (b) the tribunal shall inform, at the first reasonable opportunity, any witness under the age of 18 and any person allegedly subjected to sexual misconduct relevant to the proceedings of the right to apply for such an order;
- (c) such an order *shall* be made upon application of the witness or person allegedly subjected to sexual misconduct relevant to the proceedings or by the party sharing a common interest with that witness or person. (Alternatively, such an order *shall* be made, unless the interests of justice otherwise requires.)

Recommendations 39 to 42: Adoption of videotaped interviews

39. Early videotaped interviews with complainants and young witnesses by trained investigators greatly enhance the search for the truth and the ultimate find-finding function of courts or tribunals. Protocols between school boards, police and children's aid societies should emphasize the desirability of such interviews.

40. Section 18.3(6) of the *Ontario Evidence Act* should be adopted and more fully utilized in administrative hearings. It should be recognized that the threshold test under section 18.3(6) is different than that established in criminal proceedings.

41. The Ontario College of Teachers Discipline Committee's Rules of Procedure should specifically address the adoption of videotaped interviews.

42. The College Discipline Committee Rules of Procedure should specifically address the adoption of prior testimonial statements which are not themselves admitted as *prima facie* evidence. Arbitrators under the *Labour Relations Act*, 1995 should similarly consider the admission of adopted prior testimonial statements on this basis.

Recommendation 43: Taking of evidence before a hearing

43. Greater use should be made of Rules 10.01 to 10.03 of the Ontario College of Teachers Discipline Committee's Rules of Procedure. Use of these rules may permit the taking of evidence in a less forbidding surrounding and at a time and date more conducive to a witness' emotional well-being.

Recommendation No 44: Use of Sections 18.2 to 18.6 of the *Ontario Evidence Act*

44. Generally, sections 18.2 to 18.6 of the *Ontario Evidence Act* appropriately accommodate the best interests of young witnesses in a way which remains consistent with the interests of the adverse party. These provisions are, at times, overlooked. Ontario College of Teachers Discipline Committees and arbitration boards under the *Labour Relations Act*, 1995 should fully utilize these provisions in appropriate cases.

Recommendation 45: Evidence of other sexual activity of witnesses in non-criminal proceedings

45.1 The *Ontario Evidence Act* and the Rules of Procedure of the Discipline Committee of the Ontario College of Teachers should be

amended to specifically address the admissibility of evidence of sexual activity of a witness (other than that which is the subject matter of the proceedings) and the procedures which govern an application to tender such evidence. Arbitration boards acting pursuant to the *Labour Relations Act, 1995* should also be guided by these evidentiary and procedural rules.

45.2 These evidentiary and procedural rules should be analogous to sections 276 to 276.3 and 277 of the *Criminal Code*. Nonetheless, it should be recognized that the determination of admissibility in administrative proceedings may appropriately reflect differences in the issues and interests at stake in those proceedings.

Recommendations 46 to 47: Educational programs

46. All children's aid society workers assigned to investigate sexual abuse at schools should be experienced and well-trained in the techniques which enhance the reliability of witness statements and those that which detract from their reliability.

47.1 The Ministry of the Attorney General and the Ministry of Education should establish some joint educational programming for children's aid societies, teachers' associations and their counsel and other appropriate stakeholders on the investigation and evaluation of sexual misconduct cases to enhance understanding of the issues and reduce barriers and promote trust and understanding between the parties.

47.2 Such educational programming should address, among other things, the exchange of information between investigators and counsel for the suspected party during the investigative stages.

47.3 The Government of Ontario should provide funding assistance to enable this programming.

Recommendation 48: Education as to reporting requirement

48. An appropriate understanding of the jurisdiction and role of children's aid societies and the reporting requirement represents one means of minimizing potential over-reporting of sexual complaints and the harm which over-reporting may cause. Further education and training of educators and children's aid societies as to the meaning and use of section 72 of the *Child and Family Services Act* is desirable.

Recommendations 49 to 51: Policies and protocols throughout Ontario

49.1 Every school board in Ontario should establish and promote adherence to policies and protocols pertaining to sexual misconduct by teachers, other school staff and volunteers.

49.2 These policies and protocols should be designed to:

- (a) protect students from sexual abuse and harassment through policies that are calculated to prevent misconduct *before it occurs*;
- (b) promote the early identification of sexual misconduct, when it has occurred;
- (c) ensure that allegations of sexual misconduct are fairly investigated and evaluated;
- (d) protect students who have been victimized from further physical, psychological or emotional harm; and
- (e) recognize and complement applicable laws.

50. Given the shared responsibility and necessary interaction between school boards, children's aid societies and police for the reporting and investigation of sexual abuse allegedly engaged in by teachers, other school staff and volunteers, protocols should also be developed

cooperatively between school boards, local police forces, and children's aid societies.

51. School board policies and protocols should be regularly reviewed and updated to reflect changes to existing laws or to accommodate improvements which flow from the implementation of these policies.

Recommendations 52 to 55: Education of prospective teachers

52.1 Students at faculties of education should be fully educated on sexual abuse and harassment policies and protocols, and on their professional and ethical duties and obligations, including the protection of students through the reporting of known or suspected sexual misconduct.

52.2 Education and training should be provided on these and other appropriate subjects:

- (a) what constitutes teacher sexual misconduct. Instruction should define and illustrate sexual abuse, harassment and other offensive conduct of a sexual nature that may affect the physical integrity or security of a student or the school environment;
- (b) the appropriate and acceptable boundaries between teacher and student. Illustrations and case situations should be provided;
- (c) the scope and nature of a teacher's duty to report sexual abuse under the *Child and Family Services Act* and the duty to protect students from other forms of sexual misconduct. Instruction should address the issues surrounding reporting that have been discussed in this Report;
- (d) recognition of the early warning signs of sexual misconduct;

- (e) how to respond sensitively and appropriately to a student's disclosure of sexual misconduct, and how to address confidentiality concerns;
- (f) protecting a student complainant from further potential harm;
- (g) documenting disclosures;
- (h) the procedures that follow initial disclosure, including those applicable to a teacher suspected of misconduct;
- (i) the avoidance of stereotypical notions about sexual misconduct, its perpetrators and its victims.

53. The subject of sexual misconduct can be integrated with education and training on analogous subjects, such as physical abuse. However, sexual misconduct should form an important part of a compulsory foundation course of study at all faculties of education.

54. Faculties of education should evaluate the ways they deal with the subjects of sexual misconduct, physical abuse, professional ethics, and the duties and obligations of teachers in their pre-service programs to determine where and how instruction might be expanded and strengthened.

55. The Ontario Association of Deans of Education should co-ordinate a project that supports the creation of province-wide educational materials for use in pre-service and in professional development programs for classroom teachers.

Recommendations 56 to 58: Continuing Education

56.1 All teachers, principals, vice-principals and other school staff and volunteers who are with students on a regular and prolonged basis should be provided with ongoing in-service training on sexual misconduct policies and protocols (on both abuse and harassment), and on their professional and ethical duties, including the protection of

students through the reporting of known or suspected sexual misconduct.

56.2 In-service education and training should be provided on the topics identified in recommendation 52.2. The subject of sexual misconduct can be integrated with education and training on analogous subjects, such as physical abuse.

57. In-service training should provide, in writing, all relevant telephone numbers and contact names for a given school district. Up-to-date board policies and protocols should be provided, together with any written materials that explain or summarize existing policies.

58. Principals, vice-principals, superintendents and directors of education or any other school officials who bear additional responsibility for addressing sexual misconduct should be given special training.

Recommendation 59 to 60: Education for students and parents

59.1 Students should be provided with age-appropriate education on sexual misconduct, designed to prevent sexual abuse and harassment and to encourage disclosure of past and ongoing victimization so that authorities can intervene and protect them.

59.2 Education should deal with sexual abuse and harassment, whether engaged in by persons in positions of trust or authority, strangers, or fellow students.

59.3 Education should sensitize students to the acceptable boundaries of behaviour, teach respect for the sexual integrity and security of every person, and dispel stereotypical notions about victims and perpetrators.

60. Strategies should be developed to make education and information available to parents.

Recommendation 61: Resourcing education and training programs

61.1 The adequate education and training of prospective and current teachers, other school staff and volunteers, students and parents on sexual abuse and harassment require financial and other resources to ensure that educational programs are available and comprehensive.

61.2 The Government of Ontario bears the responsibility of ensuring the availability of these financial resources.

Recommendations 62 to 69: Screening of applicant teachers

General

62. School board policies and protocols should specifically address the screening of applicant teachers, in conformity with the recommended procedures that follow.

Records Checks

63. A criminal and disciplinary record check should be performed with respect to *every* applicant for a teaching position, regardless of whether the applicant is seeking first-time employment or a transfer from another school, district, province or country. School boards must also verify that the applicant is a member in good standing of the Ontario College of Teachers.

Application Forms

64.1 The screening process should generally entail a detailed application form, a thorough interviewing process, and verification of information, including reference checks that involve a full and candid exchange between prospective and former employers.

64.2 The application form should be comprehensive and standardized.

64.3 The application form should request complete information about experience, training, employment history, past supervisors, reasons for

leaving past employment, dates, places and addresses of all prior employers. It should note that providing deliberately misleading information can be just cause for dismissal. It should also include a consent to verify the information provided and to conduct a criminal record check.

64.4 Applications should require prospective employees to disclose whether they have been found guilty of or are currently the subject of an allegation of child abuse or sexual harassment, or have ever resigned while such allegations were pending.

Applicant Interviews

65. In-depth personal interviews should be conducted of all applicants that should include direct questions about past behaviour with students and staff.

References

66.1 Verification of information provided, through direct contact with employment references, should be designed to:

- (a) ensure that the material information provided by the applicant is correct and complete;**
- (b) identify any weaknesses or problems with the applicant's performance;**
- (c) fill in any gaps in employment history or experience;**
- (d) ask references about any defects in the applicant's fitness for the position by explaining the job description and inquiring about the applicant's skills and suitability for the tasks as defined, taking care to explain the position of trust in which the applicant will be placed with children.**

66.2 References should be asked directly whether they know of any reason why the applicant should not be hired to work with children.

66.3 School boards should respect the privacy and equality interests of applicants. Queries should be limited to job-related matters and conform to fair employment practices.

No Offer

67. No offer of employment should be made by a school board until a full investigation has been completed.

Other School Staff

68. Screening should not be confined to teachers. School staff who are in a position of trust or authority respecting students or who are exposed to children on an ongoing basis should be similarly screened.

Volunteers

69. Volunteers who are endowed with exceptional levels of trust involving frequent, lengthy and unsupervised contact with students should be screened in a manner consistent with their voluntary status.

Recommendation 70: Defining sexual misconduct in school board policies

70.1 Codes of conduct that define and explain sexual misconduct (outlined below) should be contained in school board policies and protocols. These policies should incorporate the minimum standards of conduct that apply across Ontario (and as may be reflected in the College's Code of Ethics), but may yet impose higher standards of conduct to address local concerns or circumstances.

70.2 No school employee or volunteer shall engage in sexual misconduct. Sexual misconduct is "offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment".

70.3 "Sexual misconduct" includes, but is not limited to:

Sexual Abuse

- (a) conduct which would amount to sexual interference, an invitation to sexual touching, sexual exploitation, sexual exploitation of a person with a disability, an indecent act or exposure, or a sexual assault or other crime which may affect the personal integrity or security of any student or the school environment;**

Sexual Harassment

- (b) objectionable comments or conduct of a sexual nature that may affect a student's personal integrity or security or the school environment. These may not be overtly sexual but nonetheless demean or cause personal embarrassment to a student based upon a student's gender.**

Sexual Relationships Generally

- (c) any sexual relationship with a student, or with a former student under the age of 18, and any conduct directed to establishing such a relationship**

Recommendation 71: Further defining unacceptable conduct

71.1 Codes of conduct contained in school board policies and protocols should address activities that, standing alone, may not constitute sexual misconduct but should nonetheless be prohibited or discouraged. Policies should incorporate the minimum standards of conduct that apply across Ontario (and as may be reflected in the College's Code of

Ethics), but might impose more specific rules to address local concerns or circumstances.

71.2 A school employee or volunteer should avoid activities that, standing alone, might not constitute sexual misconduct but would raise concerns in the minds of a reasonable observer as to their propriety. School employees and volunteers should be mindful of these and other considerations, in evaluating the propriety of activities:

- (a) whether the activities are known to, or approved by, supervisors and/or parents or legal guardians;**
- (b) whether the student is isolated;**
- (c) whether urgent or exigent circumstances obtain;**
- (d) whether the school environment might be detrimentally affected by the activities;**
- (e) to what extent may the activities be reasonably regarded as posing a risk to the personal integrity or security of a student, or as contributing to any student's level of discomfort.**

Recommendations 72 to 73: Receiving an initial complaint

72. School employees should be trained on how to detect the warning signs of sexual misconduct and, further, how to respond to disclosures of sexual misconduct.

73. School board policies and protocols should contain basic “dos and don’ts” that should guide such situations. Some examples follow:

DO**DON'T**

Listen to the child.

Do not lead or suggest answers to the child.

Tell the child who must be notified.

Do not promise the child not to tell anyone.

Reassure the child that the conduct described is not the child's fault and that the child has done the right thing by disclosing.

Do not criticize the child for how or when disclosure has been made.

Speak to the child in privacy.

Do not bring the suspected teacher in to confront the child.

Determine the immediate safety needs of the child, involving the child in this decision.

Do not return the child to a risk-laden situation.

Recommendations 74 to 81: Reporting policies***General***

74. School board policies and protocols should define the reporting obligations of school employees and volunteers respecting complaints or disclosures of sexual abuse or other sexual misconduct perpetrated against students and outline the procedures for reporting. Components of such policies and protocols are outlined below.

Sexual Abuse of Student under 16

75.1 Every person who has reasonable grounds to suspect that a student under the age of sixteen¹ has suffered or is at risk of likely suffering one or both of the following must forthwith report the suspicion and the information on which it is based to a children's aid society:

- (a) sexual molestation or sexual exploitation by a teacher or another person having charge of the student;²**
- (b) emotional harm demonstrated by serious anxiety, depression, withdrawal, self-destructive or aggressive behaviour, or delayed development, and there are reasonable grounds to believe that the emotional harm resulted from the actions of a teacher or other person having charge of the child.**

75.2 Every school employee and volunteer has this obligation.

75.3 Failure to report may constitute an offence under the *Child and Family Services Act* and, for a teacher, may also constitute professional misconduct.

75.4 The duty to report is a personal obligation and cannot be delegated to anyone else, including a school principal. This means that the person who has a duty to report must do so directly to a children's aid society.

75.5 The duty to report is ongoing. Where additional reasonable grounds to suspect abuse or the risk of abuse become known, a further report must be made.

¹ If the student is the subject of a protective order under the *Child and Family Services Act*, the obligation to report extends to a child who is under 18 years of age: *CFSAct*, s. 37(1).

² Or, by another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child.

75.6 The duty to report applies, even where information is acquired in confidence, or second-hand.

Sexual Abuse of Student 16 or Over

76. Every person who has reasonable grounds to suspect that a student sixteen years of age or older has suffered or is at risk of likely suffering one or both of the following should forthwith report the suspicion and the information on which it is based to the police:

- (a) sexual molestation or sexual exploitation by a teacher or another person having charge of the student;**
- (b) emotional harm demonstrated by serious anxiety, depression, withdrawal, self-destructive or aggressive behaviour, or delayed development, and there are reasonable grounds to believe that the emotional harm resulted from the actions of a teacher or other person having charge of the child.**

Addressing Immediate Needs

77. Whether a report is made to a children's aid society or to the police, the school should address immediate issues relating to the student's best interests with CAS or the police. Protocols should provide examples of matters to address:

- (a) will the student be interviewed and when;**
- (b) where will the student be interviewed;**
- (c) will a support person be permitted to attend any interview and if so, who will that support person be;**
- (d) should the student's parents be contacted; if so, how and when. This issue may also be dependent upon the student's age and whether he or she wishes to notify his or her parents; and**

- (e) what information can be shared with parents or the student;

Internal Reporting of Alleged Sexual Abuse

78. Where an employee or volunteer reasonably suspects sexual abuse, he must also promptly report to his principal or the principal's designate. Policies and protocols should also provide for a further reporting chain from the principal/designate to a superintendent to a director and ultimately to the board.

Sexual Misconduct or Related Behaviour That is Not Abuse

79.1 Every school employee or volunteer has a duty to students of any age to intervene to protect them from being the victims of sexual misconduct.

79.2 Where a school employee or volunteer knows or reasonably suspects that a student has been sexually harassed or has been the victim of sexual misconduct short of abuse, he or she must report the suspicion forthwith, and the information upon which it is based to the principal or the principal's designate.

79.3 Policies and protocols should also provide for a further reporting chain from the principal or the principal's designate to a superintendent to a director and to the board, depending here upon the nature of the conduct.

79.4 Such policies may reflect that *some* behaviour can be addressed informally and resolved through discussion with the teacher or teacher counselling.

Inapplicability of Section 18(1)(b) of the "Regulation Under the Teaching Profession Act"

80. No teacher who makes a report to the police, a children's aid society or to school officials of suspected sexual misconduct by another teacher, has any obligation, prior to or upon making such a report, to

inform the other teacher of that report or to provide that teacher with a written statement of the report.

Threats or Reprisals

81.1 Policies and protocols should specifically state that the school board has the duty to protect anyone from threats or reprisals for disclosing, reporting or otherwise providing information with respect to alleged sexual misconduct.

81.2 Such policies should outline the consequences for employees or volunteers of engaged in, or threatening to engage in, such reprisals.

Recommendations 82 to 83: Reporting to the Ontario College of Teachers

82.1 School board protocols should outline the circumstances under which disclosure should be made to the Ontario College of Teachers of information relevant to whether a teacher has engaged in sexual misconduct. These protocols should include the following components.

82.2 A school board shall promptly notify the College in writing when the board becomes aware that a member who is or has been employed by the board:

- (a) has been charged with an offence under the *Criminal Code* (Canada) which, if proven, may amount to offensive conduct of a sexual nature which may affect the personal integrity or security of any student or the school environment; or
- (b) has been found guilty of such an offence.

82.3 Where a school board dismisses, suspends or otherwise disciplines a member of the College in its employ for engaging in sexual misconduct, it shall promptly notify the College in writing of the disciplinary action, giving reasons.

82.4 If a member of the College resigns during an investigation into allegations that the member engaged in sexual misconduct, a school board shall promptly notify the College in writing of the circumstances surrounding the resignation.

82.5 In addition, a school board shall promptly notify the College in writing where, in the opinion of the board, the conduct or actions of a member who is or has been employed by the board should be reviewed by a committee of the College.

83. Principals and supervisory officers shall promptly report to their school board information relevant to that board's obligation to disclose to the College of Teachers.

Recommendations 84 to 86: Investigating sexual misconduct

84. School board policies should specifically address how and when internal investigations are to be conducted. As well, school board protocols or interagency protocols to which school boards are a party should address the interaction between boards and outside investigations. Matters that should be addressed include:

- (a) the relative roles and joint participation of the children's aid society³ and police in the conduct of investigations of sexual abuse. Protocols may provide that the police have prime responsibility for the criminal investigation and any criminal charges arising therefrom. The CAS has prime responsibility for any child protection investigation and for protection of the child;**
- (b) the factors affecting the timing of the investigation and of the initial interviews;**

³ And/or Native Child and Family Services.

- (c) the factors affecting the location of interviews, particularly those relating to when CAS or police can or should interview a student on school property;
- (d) the factors affecting whether parents will be contacted prior to any interviews, or at all;
- (e) interviewing techniques that enhance or detract from the accuracy, reliability and completeness of the student's account;
- (f) the assignment of investigators with specialized training and skills respecting child sexual abuse cases;
- (g) special needs of students with disabilities;
- (h) the desirability of early videotaping of student interviews, subject to articulated exceptions; procedures for videotaping; and retention and access to videotapes;
- (i) medical examinations of the student;
- (j) the obligation of school boards to contact the CAS or police if the student-complainant transfers to another school or board;
- (k) the exchange of information between CAS and/or the police and the school board. This may involve the designation of a school employee as case coordinator or liaison;
- (l) the status of any internal investigation, pending an ongoing CAS or police investigation or criminal charges. In the least, protocols should caution against the interviewing of the student-complainant or the suspected party by school officials and may articulate the dangers associated with conducting a concurrent investigation;

- (m) the obligation of the school principal or designate to ascertain the status of an ongoing investigation by CAS or police, if no apparent action has been taken to investigate or continue to investigate an allegation of sexual abuse;**
- (n) when a support person will be permitted to remain with a student-complainant during any interviews;**
- (o) when a suspected employee or volunteer should be notified that an allegation has been made against him or her;**
- (p) at what stage of the investigation should the suspected party be given an opportunity to address the allegations and what information should be provided to that party and/or his or her counsel to enable them to address the allegations.**

85.1 School board policies and protocols should specifically address how and when internal investigations will be conducted and by whom.

85.2 Any investigation conducted by the school should be informed by the desirability of:

- (a) avoiding or reducing trauma to the student through unnecessary or inappropriate interviewing;**
- (b) respecting the confidentiality and privacy interests of all affected parties, to the extent possible;**
- (c) ensuring fairness to the school employee or volunteer against whom a complaint has been made;**
- (d) ensuring an accurate determination, free from stereotypical notions about sexual misconduct, students or teachers.**

86. Policies and protocols should ensure that any internal investigation is conducted by school staff with appropriate training and skills.

Recommendations 87 to 91: Support structures for student complainants

General

87. School board policies and protocols should specifically ensure that support structures are in place for students who disclose alleged sexual misconduct. These support structures are contained in the following recommendations.

Support Persons

88.1 Policies and protocols should specifically address the presence of support persons during interviews with students. Where these interviews involve the children's aid society or police, interagency protocols should address this issue.

88.2 Such policies and protocols should specifically provide for the availability of school staff to remain with students who have disclosed sexual abuse until CAS or police investigators interview these students, if the interviewing is imminent, or if the student is otherwise in need of support.

88.3 A support person may be the school employee or volunteer to whom initial disclosure was made, a designated case coordinator, social worker, student services worker or another person. The student's choice should figure prominently in the identity of the support person.

Case Coordinator

89. Where feasible, each school or school board shall designate from existing staff a "case coordinator" who will be specially trained and will assist any school employee or volunteer in fulfilling the obligation to report, may be responsible for ensuring that support structures are in

place for students, and may act as liaison with children's aid societies and police. The coordinator should be someone who is comfortable with the issues involved and who is well acquainted with school board policies and protocols.

Counselling or Therapy

90. School boards bear the responsibility of ensuring that students who disclose sexual misconduct in the school setting have access to professional counselling or therapy. Boards should facilitate such counselling or therapy at the earliest opportunity following disclosure. Equally important, counselling or therapy should remain available throughout any investigation and legal process and as required thereafter. In some circumstances, such counselling should extend to family members.

Non-confrontation

91. A student who has reported sexual misconduct must not be required, other than as may be necessary in legal proceedings, to confront the suspected or accused person directly.

Recommendations 92 to 95: Actions respecting the suspected employee or volunteer

92. School board policies and protocols should specifically address the actions to be taken by them pending a determination whether sexual misconduct has occurred.

93. Where a formal investigation of sexual abuse or harassment is to occur, school employees or volunteers should generally be removed from the classroom pending a determination whether sexual misconduct has occurred. A range of options, including suspension or re-assignment to non-classroom duties can be addressed.

94. An employee's reassignment or employment status should be revisited:

- (a) upon completion of any CAS/police investigation;
- (b) after any criminal charges are laid;
- (c) after any criminal case is completed; and
- (d) upon completion of any internal investigation.

95. School board policies and protocols should specifically state that the board needs to make a determination whether sexual misconduct has occurred, whether or not any criminal charges have resulted in findings of guilt.

Recommendation 96: A communication plan

96. School board policies and protocols should specifically create a communication plan subsequent to disclosures of alleged sexual misconduct by school employees or volunteers. Such a plan should address the following matters:

- (a) what information will be communicated, when and by whom;
- (b) respect for the privacy rights of affected parties, to the extent possible;
- (c) the need for factual accuracy and fairness to all affected parties;
- (d) the desirability of affirming or supporting students who disclose sexual misconduct, while maintaining the presumption of innocence.

Recommendation 97: Documentation

97.1 School board policies and protocols should specifically address the making and retention of records pertaining to complaints of sexual misconduct committed by school employees or volunteers. Components of such policies are contained in the recommendations that follow.

97.2 Proper documentation should include details respecting any initial complaint or disclosure; any report made to a children's aid society, police, the College of Teachers or within the school board; correspondence relating to the complaint; notes or other documents relating to any internal investigation, including interview notes or tapes; the results of any internal or external investigation or legal proceedings; and any disciplinary or other measures taken by the school board, including reprimands or cautions.

97.3 Note-taking on interviews should be factual and detailed. A particular effort should be made to accurately record the complainant's own words.

97.4 Policies and protocols may address, sometimes in conjunction with collective agreements, retention periods for documents to prevent "unfounded" allegations from prejudicing a school employee. Otherwise, documentation respecting substantiated, unsubstantiated or unresolved complaints of sexual misconduct should be retained in the employee's personnel file indefinitely and should not be the subject of collective agreement provisions setting limited periods of retention.

97.5 Measures should be taken to ensure that the confidentiality and privacy interests of students or informants in cases of alleged sexual misconduct are preserved, to the fullest extent possible. This means, for example, that their names or information that may identify them should generally not be disclosed to prospective or new employers and may be edited out of personnel records. Policies and protocols should provide for the retention of unedited information in a separate file and for the location of that file.

Recommendation 98: Resignations and full disclosure

98.1 School board policies and protocols should specifically address resignations and the need to provide full and frank references upon request. The components of such a policy are contained in the following recommendations.

98.2 Personnel files of all employees must reflect the circumstances surrounding any resignation from employment relating to allegations of sexual misconduct. The content of these files should respect the confidentiality and privacy interests of students and informants.

98.3 Policies and protocols should specifically address the physical location and transfer of these personnel files or the information contained therein to an employee's new school or school board.

98.4 School boards should provide full and frank references to prospective employers, upon request. No resignation of an employee will be secured by agreement not to disclose facts relating to allegations of sexual misconduct to a prospective employer. Policies and protocols may differently address "unfounded allegations".

Recommendation 99: Financial resources to implement objectives

99. The Government of Ontario ultimately bears the responsibility of ensuring that financial and other resources are available to achieve the important objectives of protecting our children and ensuring a school environment free from violence, abuse, harassment and discrimination.

Recommendations 100 to 101: Development of policies and protocols

100. The development of school board policies and protocols on sexual misconduct by school employees and volunteers should, at least in part, be informed by the checklist of topics, together with commentary appended to Chapter VI of this Report.

101. The Ministry of Education, in cooperation with Ontario school boards, should review, on a periodic basis, the development of school board policies and protocols across the province respecting sexual misconduct by school employees and volunteers and the implementation of such policies.

APPENDICES





Order in Council Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit:

Order in Council

WHEREAS it has been determined that it is desirable to authorize under the common law and pursuant to the prerogative of Her Majesty the Queen in right of Ontario and in the discharge of the government's executive functions, an individual to conduct a review of incidents involving Kenneth Deluca and students of the former Sault Ste. Marie Roman Catholic Separate District School Board from the late 1970s to the early 1990s to the extent appropriate to make recommendations on policies and procedures;

AND WHEREAS it is desirable to set out the terms of reference for such a review;

NOW THEREFORE the Honourable Sidney L. Robins be authorized to conduct such a review;

AND THAT the Honourable Mr. Robins' mandate be as follows:

The Honourable Mr. Robins shall carry out a review into and prepare a report for the Attorney General by 31 October, 1999 with respect to the following matter:

The incidents involving Kenneth Deluca which gave rise to charges and the prosecution and guilty pleas of Mr. Deluca with respect to the sexual assault of female students enrolled in the former Sault Ste. Marie Roman Catholic Separate District School Board from the late 1970s to the early 1990s to the extent appropriate to make recommendations regarding protocols, policies and procedures to effectively identify and prevent sexual assault, harassment or violence.

The Honourable Mr. Robins may:

- a) request any person to provide information or records to him where he has reasonable grounds to believe that the person has in his, hers or its possession or control such information or records;

- b) hold such private meetings, for any person to provide information or records that are relevant to Mr. Robins' mandate under these Terms of Reference.

The report of Mr. Robins shall be prepared in a form appropriate for release to the public, pursuant to the Freedom of Information and Protection of Privacy Act.

To the extend that Mr. Robins considers advisable, he may rely on any relevant transcript or record of pretrial, trial or other legal proceedings before any court in relation to any criminal or civil litigation or administrative proceedings with respect to Kenneth Deluca.

Mr. Robins shall perform these duties without expressing any conclusion or recommendation regarding the civil or criminal responsibility of any person or organization, without interfering in any ongoing criminal, civil or other legal proceedings, and without making any findings of fact with respect to civil or criminal responsibility of any person or organization,

All ministries, boards, agencies and commissions of the Government of Ontario shall assist the Commission to the fullest extent so that the Commission may carry out its duties.

Mr. Robins shall be provided with such resources as are required, and authorized by the Attorney General and shall have authority to engage lawyers, experts, research and other staff as he deems appropriate subject to the policies and procedures of the Government of Ontario with respect to engagement of consulting services and at remuneration as approved by the Attorney General.

Recommended



Attorney General

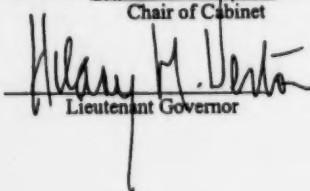
Concurred



Chair of Cabinet

Approved and Ordered

MAY 5 - 1999



Lieutenant Governor



Order in Council Décret

On the recommendation of the undersigned,
the Lieutenant Governor, by and with the
advice and concurrence of the Executive
Council, orders that:

Sur la recommandation du soussigne, le
lieutenant-gouverneur, sur l'avis et avec le
consentement du Conseil des ministres,
décrète ce qui suit:

Pursuant to the common law and prerogative authority of Her Majesty the Queen in right of Ontario and in the discharge of the government's executive functions an amendment be made to the Order in Council numbered O.C. 1308/99 and dated May 5, 1999, by substituting "29 February, 2000" for "31 October, 1999" on the first page of the Order.

Recommended

A handwritten signature in black ink.

James M. Flaherty
Attorney General

Approved and Ordered

OCT 27 1999

Date

Concurred

A handwritten signature in black ink.

R.W. Balmer
Chair of Cabinet

A handwritten signature in black ink.

Hilary M. Weston
Lieutenant Governor



A REVIEW TO MAKE RECOMMENDATIONS TO IDENTIFY AND PREVENT SEXUAL ASSAULTS IN ONTARIO SCHOOLS

REQUEST FOR INFORMATION

The Honourable Sydney L. Robins has been appointed by the Government of Ontario to conduct a review of the incidents involving Kenneth DeLuca which gave rise to charges and the prosecution and guilty pleas of Mr. DeLuca with respect to the sexual assault of female students enrolled in the former Sault Ste. Marie District Roman Catholic Separate School Board from the 1970s to the early 1990s and to make recommendations regarding protocols, policies and procedures to effectively identify and prevent sexual assault in Ontario schools.

Anyone wishing to provide information relevant to the review of the incidents involving Mr. DeLuca or wishing to file submissions, make recommendations or discuss these matters are requested to contact the Review at:

**The Robins Review
180 Dundas Street West, 22nd Fl.
Toronto, ON M5G 1Z8**

Tel: (416) 326-2705
Toll Free: 1-877-333-5307
Fax: (416) 326-0725

The Honourable Sydney L. Robins
Chair

Carolyn Silver
Counsel





**A REVIEW TO MAKE RECOMMENDATIONS TO IDENTIFY AND
PREVENT SEXUAL ASSAULTS IN ONTARIO SCHOOLS**

Questionnaire for School Boards

NAME OF SCHOOL BOARD: _____

OF STUDENTS: _____ # OF EMPLOYEES (FTE) _____

1. Do you have a Code of Conduct or policies with respect to teachers' behaviour towards students?
- for other school staff? Yes No
- for volunteers (including parent volunteers)? Yes No
(If yes, please enclose a copy with your completed questionnaire)
2. Do you have policies on sexual assault or sexual harassment that include teachers' behaviour towards students?
- for other school staff? Yes No
- for volunteers (including parent volunteers)? Yes No
(If yes, please enclose a copy with your completed questionnaire)
3. Do you have screening protocols dealing with teachers' history with sexual assault/abuse/harassment at the time of hiring?
- for other school staff? Yes No
- for volunteers (including parent volunteers)? Yes No
(If yes, please enclose a copy with your completed questionnaire)

- 4a. Do you have protocols for dealing with disclosure of teacher sexual assault/abuse/harassment of students? Yes No
 - for other school staff? Yes No
 - for volunteers (including parent volunteers)? Yes No
(If yes, please enclose a copy with your completed questionnaire)
- 4b. Do you have protocols (interagency protocol) for the investigation of sexual assault/abuse/harassment with police/CAS?
 - for teachers Yes No
 - for other school staff Yes No
 - for volunteers (including parent volunteers) Yes No
(If yes, please enclose a copy with your completed questionnaire)
- 4c. Do you have protocols for the co-ordination of criminal proceedings and administrative proceedings for cases of sexual assault/abuse/harassment? (i.e. what effect, if any, does the outcome of criminal proceeding have on whether your Board proceeds with disciplinary action?)
 - for teachers Yes No
 - for other school staff Yes No
 - for volunteers (including parent volunteers) Yes No
(If yes, please enclose a copy with your completed questionnaire)
5. Do you have training and awareness programs on sexual assault/abuse/harassment?
 - for teachers Yes No
 - for principals & vice principals Yes No
 - for supervisory officers Yes No
 - for other school staff Yes No
 - for students Yes No

- for parents Yes No

- for volunteers Yes No

(If yes, please enclose a copy with your completed questionnaire)

6. What are the major dilemmas for your Board in dealing with sexual harassment/assault by teachers/other school staff/volunteers against students.

a) _____

b) _____

c) _____

- 7a. Between January 1, 1998 and June 30, 1999 how many teachers/other school staff/volunteers have been terminated due to findings of sexual assault/abuse/harassment?

Sexual Assault/Abuse Sexual Harassment

Teachers _____ _____

Other School Staff _____ _____

Volunteers _____ _____

- 7b. Please indicate sex of teacher/other staff/volunteer and sex/age of student related to the above terminations:

	Sexual Assault/Abuse		Sexual Harassment	
	Sex	Sex/Age	Sex	Sex/Age
	Employee	Student	Employee	Student

Teachers _____ _____

Other School Staff _____ _____

Volunteers _____ _____

8. In question 7 we chose the date January 1, 1998 recognizing that many boards were amalgamated into new district boards and prior records may be difficult to obtain. If you do have records from January 1, 1990 to December 31, 1997, we would be interested in knowing how many teachers/other school staff/volunteers were terminated due to administrative or criminal findings of sexual assault/abuse/harassment?

Sexual Assault/Abuse	Sexual Harassment
-----------------------------	--------------------------

Teachers	_____	_____
Other School Staff	_____	_____
Volunteers	_____	_____

9. How many cases of sexual abuse/assault/harassment by teachers/school staff/volunteers have come forward since January 1, 1998 where the allegations were unfounded? (by unfounded, we refer to allegations that had no basis in fact or that provided no reasonable grounds for suspecting that abuse had occurred)

Sexual Assault/Abuse	Sexual Harassment
-----------------------------	--------------------------

Teachers	_____	_____
Other School Staff	_____	_____
Volunteers	_____	_____

- 10a. How many teachers/other school staff/volunteers retired or resigned during the period January 1, 1998 - June 30, 1999 while allegations of sexual assault/abuse/harassment were outstanding?

Sexual Assault/Abuse	Sexual Harassment
-----------------------------	--------------------------

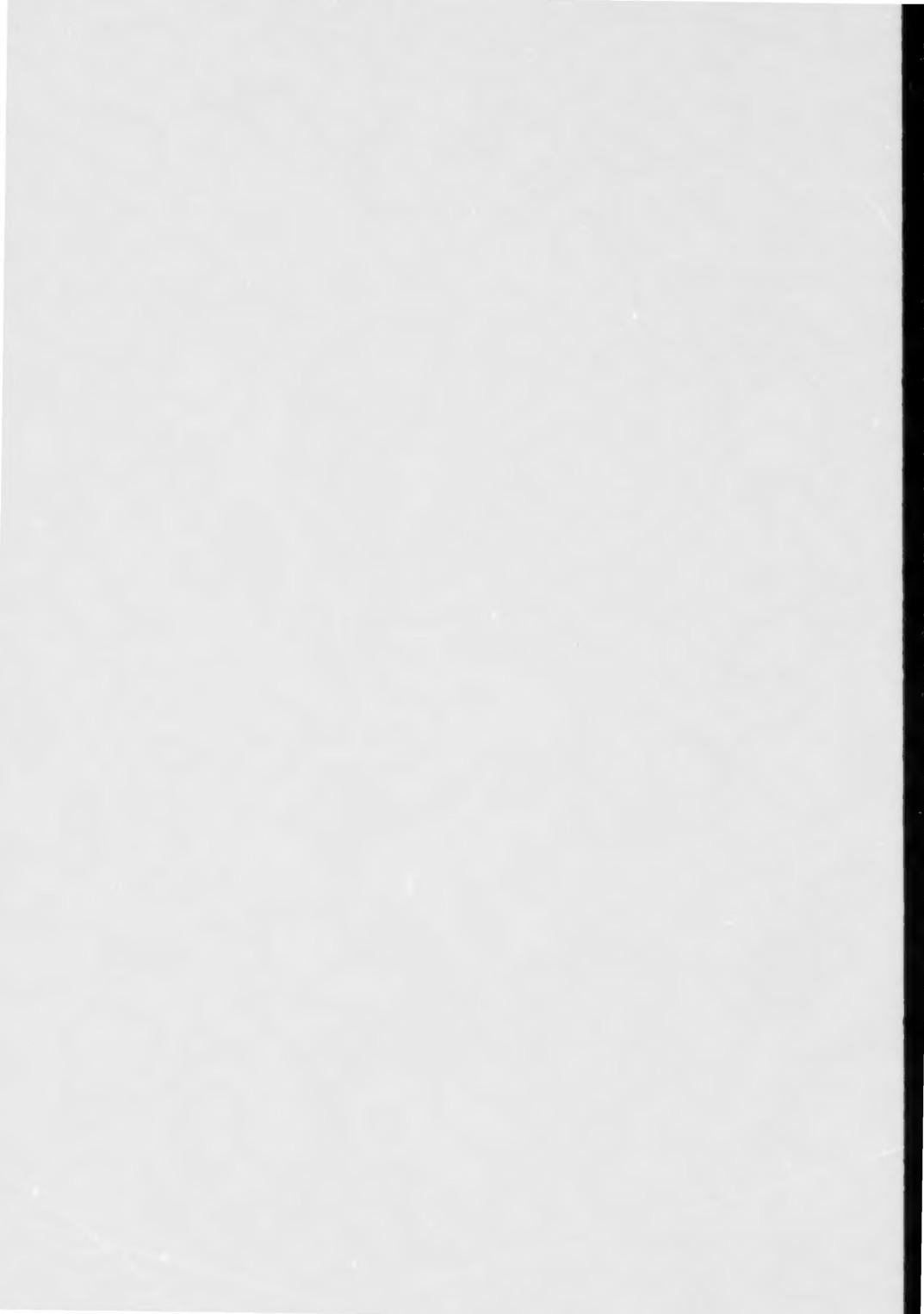
Teachers	_____	_____
Other School Staff	_____	_____
Volunteers	_____	_____

- 10b. How many teachers/other school staff/volunteers retired or resigned during the period January 1, 1990 - December 31, 1997 while allegations of sexual assault/abuse/harassment were outstanding?

	Sexual Assault/Abuse	Sexual Harassment
--	----------------------	-------------------

Teachers	<hr/>	<hr/>
Other School Staff	<hr/>	<hr/>
Volunteers	<hr/>	<hr/>

11. Your suggestions as to recommendations that might be made to protect students from sexual abuse:





A REVIEW TO MAKE RECOMMENDATIONS TO IDENTIFY AND PREVENT SEXUAL ASSAULTS IN ONTARIO SCHOOLS

Questionnaire for Children's Aid Societies

NAME OF AGENCY: _____

DISTRICT SERVED: (major city or county) _____

POPULATION: (# served) _____

- | | | |
|--|------------|-----------|
| <p>1. Do you have a protocol with local school boards with respect to child sexual abuse investigations of their staff?
<i>(if yes indicate which boards and attach a copy of the protocol)</i></p> <p>2. Do you treat investigations of teachers, other school staff or volunteers differently within a school board?</p> | YES | NO |
|--|------------|-----------|

If yes, please explain:

- | | | |
|---|------------|-----------|
| <p>3. Do you provide training or awareness programs for school boards on the topic of child sexual abuse that includes the possibility that school staff may be perpetrators of abuse?</p> <ul style="list-style-type: none"> - for teachers - for students - for parents - principals/vice principals - supervisory officers <p>4. Since January 1, 1998, how many investigations have been conducted of complaints against school staff?</p> | YES | NO |
|---|------------|-----------|

		Sex Employee Male	Female	Age/Sex of Students
a)	teachers	_____	_____	_____
b)	other school staff	_____	_____	_____
c)	volunteers	_____	_____	_____
5. Of these investigations, how many complaints:				
a)	were unfounded (by unfounded, we refer to allegations that had no basis in fact or that provided no reasonable grounds for suspecting that abuse had occurred)	_____		
b)	were confirmed on a balance of probabilities but no criminal proceedings were taken	_____		
c)	resulted in a criminal conviction (or charges currently before the court) or guilty plea	_____		
d)	resulted in an acquittal of criminal charges	_____		

6. In questions 4 and 5 we chose the date January 1, 1998 recognizing many boards were amalgamated into new district boards and prior records may be difficult to obtain. If you do have records from January 1, 1990 to December 31, 1997, we would be interested in knowing how many teachers/other school staff/volunteers were investigated in former boards?

Sexual Assault/Abuse (January 1990 - December 1997) Investigations

		Sex Employee Male	Female	Age/Sex of Students
a)	teachers	_____	_____	_____
b)	other school staff	_____	_____	_____
c)	volunteers	_____	_____	_____

Of these investigations, how many complaints:

- a) were unfounded (by unfounded, we refer to allegations that had no basis in fact or that provided no reasonable grounds for suspecting that abuse had occurred) _____
- b) were confirmed on a balance of probabilities but no criminal proceedings were taken _____
- c) resulted in a criminal conviction (or charges currently before the court) or guilty plea _____

d) resulted in an acquittal of criminal charges _____

7. What estimated percentage of your disclosures of sexual abuse come from the following groups:

Teachers _____% Other School Staff _____% Administration _____%

Parents _____% Students _____%

8. What are the major dilemmas for your agency in dealing with sexual harassment/assault complaints against teachers/other school staff/volunteers.

a) _____

b) _____

c) _____

9. Please include any additional comments you wish to make:



SCHOOL BOARDS AND AUTHORITIES

1. Algoma District School Board
2. Algonquin and Lakeshore Catholic District School Board
3. Alry and Sabine DSAB
4. Asquith-Garvey DSAB
5. Atikokan RCSSB
6. Avon Maitland District School Board
7. The Bloorview MacMillan School Authority
8. Bluewater District School Board
9. Brant Haldimand-Norfolk Catholic District School Board
10. Bruce-Grey Catholic District School Board
11. Campbell Children's School BE
12. Caramat DSAB
13. Cardiff Bicroft Combined RCSSB
14. Catholic District School Board of Eastern Ontario
15. Conseil scolaire de district catholique des Aurores boréales
16. Consell scolaire de district catholique du Centre-Est de l'Ontario
17. Conseil scolaire de district catholique de l'Est ontarien
18. Conseil scolaire de district des écoles catholiques du Sud-Ouest

19. Conseil scolaire de district catholique Centre-Sud
20. Conseil scolaire de district du Centre Sud-Ouest
21. Collins DSAB
22. Connell and Ponsford DSAB
23. District School Board Ontario North East
24. District School Board of Niagara
25. Dubreuilville RCSSB
26. Dufferin-Peel Catholic District School Board
27. Durham Catholic District School Board
28. Durham District School Board
29. Essex County Children's Rehabilitation Centre BE
30. Foleyet DSAB
31. Foleyet RCSSB
32. Conseil scolaire de district catholique Franco-Nord
33. Gogama DSAB
34. Gogama RCSSB
35. Grand Erie District School Board
36. Conseil scolaire de district catholique des Grandes Rivières
37. Conseil scolaire de district du Grand Nord de l'Ontario
38. Greater Essex County District School Board

39. Halton District School Board
40. Halton Catholic District School Board
41. Hamilton-Wentworth District School Board
42. Hamilton-Wentworth Catholic District School Board
43. Hastings and Prince Edward District School Board
44. Hornepayne RCSSB
45. Huron Perth Catholic District School Board
46. Huron-Superior Catholic District School Board
47. Ignace RCSSB
48. James Bay Lowlands SSB
49. Kashabowie DSAB
50. Kawartha Pine Ridge District School Board
51. Keewatin-Patricia District School Board
52. Kenora Catholic District School Board
53. Kilkenny DSAB
54. Lakehead District School Board
55. Lambton Kent District School Bard
56. Limestone District School Board
57. London District Catholic School Board
58. Conseil des écoles de l'est de l'Ontario

59. Mine Centre DSAB
60. Missarenda DSAB
61. Moose Factory Island DSAB
62. Moosonee DSAB
63. Moosonee RCSSB
64. Murchinson and Lyell DSAB
65. Nakina DSAB
66. Near North District School Board
67. Niagara Catholic District School Board
68. Niagara Peninsula Children's Centre School Authority
69. Nipissing-Parry Sound Catholic District School Board
70. Conseil scolaire de district du Nord-Est de l'Ontario
71. Northeastern Catholic District School Board
72. Northern DSAB
73. Northwest Catholic District School Board
74. Conseil scolaire de district catholique du Nouvel Ontario
75. Ottawa-Carleton District School Board
76. Ottawa-Carleton Catholic District School Board
77. Ottawa Children's Treatment Centre
78. Parry Sound RCSSB

79. Peel District School Board
80. Penetanguishene Protestant SSB
81. Peterborough Victoria Northumberland and Clarington Catholic District School Board
82. Rainbow District School Board
83. Rainy River District School Board
84. Red Lake Area Combined RCSSB
85. Renfrew County District School Board
86. Renfrew Cty Catholic District School Board
87. Rotary Children's Centre School Authority
88. Simcoe County District School Board
89. Simcoe Muskoka Catholic District School Board
90. St. Clair Catholic District School Board
91. Sturgeon Lake DSAB
92. Sudbury Catholic District School Board
93. Summer Beaver DSAB
94. Superior-Greenstone District School Board
95. Superior North Catholic District School Board
96. Thames Valley District School Board
97. Thunder Bay Catholic District School Board

- 98. Toronto District School Board**
- 99. Toronto Catholic District School Board**
- 100. Trillium Lakelands District School Board**
- 101. Upper Canada District School Board**
- 102. Upper Grand District School Board**
- 103. Upsala DSA**
- 104. Waterloo Region District School Board**
- 105. Waterloo Catholic District School Board**
- 106. Wellington Catholic District School Board**
- 107. Windsor-Essex Catholic District School Board**
- 108. York Catholic District School Board**
- 109. York Region District School Board**

CHILDREN'S AID SOCIETIES

1. Abinoojii Family Services Inc.
2. Algoma Childrens's Aid Society
3. Brant Children's Aid Society
4. Bruce Children's Aid Society
5. Dilico Ojibway Child & Family Services
6. Dufferin Child & Family Services
7. Durham Children's Aid Society
8. Elgin Family & Children's Services
9. Windsor-Essex Children's Aid Society
10. Frontenac Children's Aid Society
11. Grey Children's Aid Society
12. Haldimand-Norfolk Children's Aid Society
13. Halton Children's Aid Society
14. Hamilton-Wentworth Children's Aid Society
15. Hamilton-Wentworth Catholic Children's Aid Society
16. Hastings Children's Aid Society
17. Huron Children's Aid Society
18. Jewish Family & Child Services

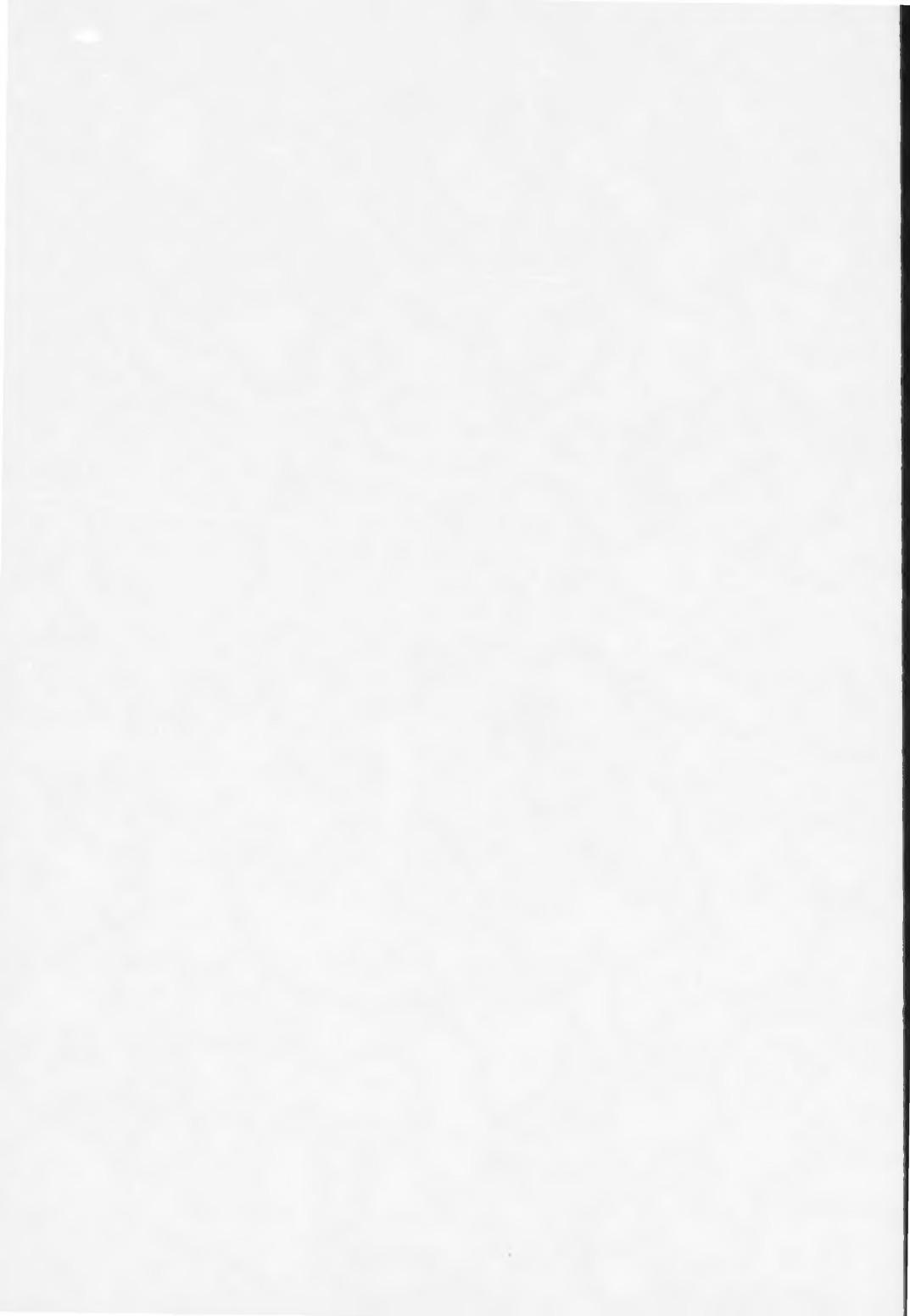
19. **Kapuskasing Family & Children Services**
20. **Kawartha-Haliburton Children's Aid Society**
21. **Kenora-Patricia Child & Family Services**
22. **Chatham-Kent Integrated Children's Services - CAS**
23. **Lanark Children's Aid Society**
24. **Leeds & Grenville Children's Aid Society**
25. **Lennox & Addington Family & Children's Services**
26. **London & Middlesex Children's Aid Society**
27. **Family & Children's Services of Muskoka**
28. **Niagara Family & Children's Services**
29. **Nipissing Children's Aid Society**
30. **Northumberland Children's Aid Society**
31. **Ottawa-Carleton Children's Aid Society**
32. **Oxford Children's Aid Society**
33. **Parry Sound Children's Aid Society**
34. **Payukotayno: James & Hudson Bay Child & Family Services**
35. **Peel Children's Aid Society**
36. **Perth Children's Aid Society**
37. **Porcupine Children's Aid Society**
38. **Prescott & Russell Children's Aid Society**

39. Prince Edward Children's Aid Society
40. Rainy River Family & Children's Services
41. Renfrew Family & Children's Services
42. Sarnia/Lambton Children's Aid Society
43. Simcoe Children's Aid Society
44. Stormont, Dundas & Glengarry Children's Aid Society
45. Sudbury-Manitoulin Children's Aid Society
46. Thunder Bay Children's Aid Society
47. Tikinagan Child & Family Services
48. Timiskaming Children's Aid Society
49. Children's Aid Society of Toronto
50. Catholic Children's Aid Society of Toronto
51. Waterloo Family & Children's Services
52. Weechi-it-te-win Child & Family Services
53. Wellington Family & Children's Services
54. York Region Children's Aid Society



POLICE SERVICE BOARDS

1. Durham Regional Police Service
2. Guelph Police Service
3. Hamilton-Wentworth Regional Police Service
4. Kingston Police Service
5. London Police
6. Niagara Regional Police Service
7. North Bay Police Service
8. Peel Regional Police Service
9. Peterborough Community Police Service
10. Sarnia Police Service
11. Sault Ste. Marie
12. Sudbury Regional Police Service
13. Thunder Bay Police Service
14. Toronto Police Service
15. Waterloo Regional Police Service
16. Windsor Police Service
17. York Regional Police Service



ORGANIZATIONS AND INDIVIDUALS

The following organizations and individuals met with, provided information, or made submissions, to the review.

1. Ontario Teachers' Federation

Susan Langley - Secretary-Treasurer
Paul Howard - Secretariat Member
Julia Martin - Counsel

2. Ontario College of Teachers

Margaret Wilson - Registrar
Patrick O'Neill - Co-ordinator, Investigations & Hearings

3. Ontario Public School Board Association

Elizabeth Sandals - President & Trustee, Upper Grand School Board
Gail Anderson - Executive Director
Bill Kay - Director Labour Relations
Grant Bowers - Superintendent Employee Relations,
Toronto District School Board
Bruce Stewart - Counsel

4. Association des conseillères et des conseillers des écoles publiques de l'Ontario (ACEPO)

Daniel Morin - President
Louise Pinet - Director General
Annie Dell - Vice President

5. Ontario Catholic School Trustees' Association

Regis O'Connor - President
Patrick Slack - Executive Director

- 6. L'Association Franco-ontarienne des conseils scolaires catholiques**
- 7. Elementary Teachers' Federation of Ontario**

Phyllis Benedict - President
Susan Swackhammer - First Vice-President
Diane Balanyk-McNeil - Co-ordinator, Professional
Relations Services
Bill Getty - Co-ordinator, Collective Bargaining Services
Michael Code - Counsel
Melvyn Green - Counsel
Howard Goldblatt - Counsel

- 8. Ontario English Catholic Teachers' Association (OECTA)**

Claire Ross - General Secretary
Jim Smith - President
William Markle, QC - Counsel
Stephanie L. Carey - Counsel

- 9. Ontario Secondary School Teachers' Federation (OSSTF)**

Bruce McWhinnie - Executive Assistant
Jim Foster - Associate General Secretary
Maurice Green - Counsel

- 10. L'Association des enseignantes et des enseignants Franco-
Ontariens (AEFO)**

- 11. Victim/Witness Assistance Program**

Catharine Finley - Director
Susan Physick - Co-ordinator

- 12. Toronto Child Abuse Centre**

Barb McIntyre - Program Manager
Karyn Kennedy - Programs Co-ordinator
Sharon Hart - Child Witness Advocate

13. Crown Attorneys' Association

Sarah Welch - President
Paul Normandeau
John Ball

14. Criminal Lawyers' Association

Irwin Koziebrocki - Vice President
Michelle Fuerst - Vice President
Michael Lomer - Secretary

15. Huron-Superior Catholic District School Board

Dr. Cecile Somme - Director of Education
Gordon P. Acton - Counsel

16. Thames Valley District School Board

17. Ontario Principals' Council

18. The Catholic Principals' Council of Ontario

19. Sexual Abuse Co-Ordinating Committee (Sault Ste. Marie)

20. Thomas J. McEwen - Counsel for certain plaintiffs in the DeLuca civil action

21. John Walker - Counsel for certain plaintiffs in the DeLuca civil action

22. John Bisceglia - Counsel for certain defendants in the DeLuca civil action

23. Gordon P. Acton - Counsel for defendant School Board and certain other defendants in the DeLuca civil action

24. Sgt. D'arcy Keating - Sault Ste. Marie Police

25. Stephen Paciocco - Assistant Crown Attorney, Sault Ste. Marie

26. Nicholas Bala - Professor of Law, Faculty of Law, Queen's University
27. Anne O'Connor M.S.W., C.S.W.
28. Maureen Reid, M.S.W. - Supervisor Child Abuse Intervention Program, Children's Aid Society of London-Middlesex
29. David Wolfe, Ph.D. - Professor, Department of Psychology, University of Western Ontario
30. June Larkin, Ph.D. - Professor, Faculty of Education, Ontario Institute for Studies in Education
31. Rebecca Coulter, Ph.D. - Associate Dean, Faculty of Education, University of Western Ontario
32. Catherine Stewart, M.S.W. - Consultant, Toronto
33. Jane Anweiler, Barrister & Solicitor, Toronto

Summary of DeLuca's Sentences

Victim	Offence	Sentence
A	Indecent assault	10 months (consecutive)
B	Indecent assault	3 months (concurrent)
I	Indecent assault	8 months (concurrent)
K	Indecent assault	4 months (concurrent)
J	Indecent assault	10 months (consecutive)
M	Indecent assault	3 months (concurrent)
Q	Sexual assault	3 months (concurrent)
R	Sexual assault	3 months (concurrent)
T	Sexual assault	8 months concurrent
Ms. Doe	Sexual assault	12 months (consecutive)
V	Counsel sexual touch Sexual assault	3 months (consecutive) 3 months (concurrent)
X	Sexual assault	3 months (consecutive)
Y	Sexual assault	2 months (consecutive)
Total		40 months



Huron-Superior Catholic District School Board

POLICY TITLE: CHILD ABUSE POLICY AND PROCEDURES

Approved:

POLICY NO: 8000

Page 1 of 27

POLICY

It is the policy of the Huron-Superior Catholic District School Board to protect, insofar as possible, its pupils from Child Abuse by providing and implementing a clearly defined set of procedures, (established in compliance with the Child and Family Services Act, August 1993), to be followed in the case of any alleged abuse of a pupil.

Therefore, *every employee/representative* of the Board who has *reasonable grounds to suspect* that a *child* is in need of protection as described in the Child and Family Services Act, August 1993, Part III, Child Protection, Section 37, 72 & 85(l);

- *has suffered physical harm,*
- *there is a substantial risk that the child will suffer physical harm,*
- *has been sexually molested,*
- *there is a substantial risk that the child will be sexually molested,*
- *has suffered emotional harm,*
- *there is a substantial risk that the child will suffer emotional harm",* (section 37 Child & Family Services Act).

SHALL FORTHWITH REPORT this belief to the Children's Aid Society and/or the Police Services (where appropriate) and then to the principal and/or supervisor.

The reporting requirement for professionals (including teachers and counsellors) is a broader requirement than for the general public.

"(3) Despite the provisions of any other Act, a person referred to in subsection (4) who, in the course of his or her professional or official duties, has reasonable grounds to suspect that a child is or may be suffering or may have suffered abuse shall forthwith report the suspicion and the information on which it is based to a society." (Section 72(3) Child & Family Services Act).

The Board insists on reporting (according to this policy and the accompanying procedures), and endorses the need to ensure that the child making a disclosure of abuse is supported and safe. (See *Procedures for Reporting Child Abuse: Appendix A.*)

It is also the policy of the Board, where the alleged abuser is an employee/representative of the Board to provide and implement procedures to be followed in the case of the alleged abuse of the pupil.

Note: A report indicating all allegations of abuse against employees shall be made quarterly to the board, as well as at the first board meeting after which an allegation has been made.

PROCEDURES FOR REPORTING CHILD ABUSE

A. PROCEDURES FOR REPORTING CHILD ABUSE WHERE THE ALLEGED ABUSER IS NOT AN EMPLOYEE/REPRESENTATIVE OF THE BOARD.

[Not reproduced]

B. PROCEDURES FOR REPORTING CHILD ABUSE WHERE AN EMPLOYEE/REPRESENTATIVE OF THE BOARD IS THE ALLEGED ABUSER.

B. PROCEDURES WHERE AN EMPLOYEE OR A PERSON REPRESENTING THE BOARD IS THE ALLEGED ABUSER.

In cases where a pupil is alleged to have suffered abuse by an employee, or a person representing the Board, the procedures are based on the following position:

- promoting the best interest, care, protection, and well-being of pupils. (If the pupil is under the age of 18 years, the investigating team in consultation with the principal will make arrangements for contacting the child's parent about the abuse prior to the child being interviewed.)
 - recognizing where an employee or person representing the Board is the alleged offender, this person is entitled to:
 - (a) the right to have representation,
 - (b) the presumption of innocence,
 - (c) confidentiality insofar as it is possible,
 - (d) a fair hearing;
 - complying with the applicable legislation;
 - applying discipline where appropriate.
1. The employee/representative who has reasonable grounds to suspect that abuse has occurred or is occurring shall **FORTHWITH REPORT SUCH INCIDENTS:**
- (a) If the pupil is under 16 years of age, *or a ward of Children's Aid Society (C.A.S.) up to 18 years*, contact the
- Children's Aid Society (Algoma) - (705) 949-0162;*
Children's Aid Society (Sudbury) - (705) 522-8600
Children's Aid Society (Chapleau) - (705) 864-0329
- (b) If the pupil is 16 years of age and up to 18 years, contact the **Police Services.** (See Appendix A)
- (c) If the pupil is 18 years of age or older, the employee/representative of the Board, to whom a disclosure is made, is encouraged to support the pupil in reporting the incident/situation to the Police Services.

Note: From the Children's Aid Society Protocol:

School employees who are unsure as to whether the information they have warrants reporting will consult with the Children's Aid Society of Algoma and/or the Children's Aid Society of Sudbury-Manitoulin.

2. **After** calling the C.A.S. or Police Services the employee/representative SHALL FORTHWITH:
 - a) complete the CHILD ABUSE REPORTING FORM, *as far as possible*;
 - b) inform the principal/supervisor that a report has been made;
 - c) obtain the signature of the principal/supervisor on the completed CHILD ABUSE REPORTING FORM;
 - d) mail a copy of the completed CHILD ABUSE REPORTING FORM to C.A.S. or Police Services;
 - e) distribute copies of the completed CHILD ABUSE REPORTING FORM, **as indicated on the form**, i.e.: School Superintendent;
 - f) retain one copy of the completed CHILD ABUSE REPORTING FORM for self.
3. The principal shall:
 - (a) FORTHWITH CONTACT THE DIRECTOR/DESIGNATE;
 - (b) file a copy of completed CHILD ABUSE REPORTING FORM in the in-school file "**CHILD ABUSE REPORTING**".
4. The principal/supervisor and the person reporting shall keep a written account of any pertinent facts relating to the incident, i.e.:
 - person reporting - a written account of incidents as told by the child;
 - ongoing observations;
 - contacts with C.A.S. / Police Services.

These written facts shall be made available, upon request, to the C.A.S., Police Services, the Director/Designate, and legal counsel for the employee/representative and Board.

Note: Legal Counsel is provided for the employee/representative of the Board, who reports the alleged abuse, if needed, through the Director/Designate.

5. The employee/representative making the report and the principal/supervisor shall cooperate with the investigating agency(ies), i.e C.A.S., Police Services.
6. The employee/representative who made the report shall be kept informed, where possible, of the proceedings.
7. a) The principal/supervisor shall, in accordance with the Criminal Code, inform the alleged offender that a report has been made to the C.A.S. or Police Services. **This means that the alleged offender is informed unless C.A.S. or Police Services indicate that such knowledge would interfere with the investigation.** Details or particulars shall NOT be provided to the alleged offender, (i.e.: name of person making the report, or name of child making the disclosure).

- b) When the principal/supervisor advises the alleged offender of the report, the alleged offender shall be made aware of the right to assistance from the appropriate Association or Union..
- c) The principal/supervisor shall NOT interview the pupil or the alleged offender. Investigation of the incident will be handled by the Children's Aid Society and/or the Police Services who have the expertise to investigate allegations of abuse.
- d) The principal/supervisor and the employee/representative who made the report may be interviewed by the Children's Aid Society, Police Services and the Staff Review Panel. (See #8 below.)

8. **STAFF REVIEW**

- (a) Upon notification that a report has been made to the C.A.S. or Police Services alleging child abuse by an employee/representative of the Board, the Director/designate shall liaise with Children's Aid Society and/or Police Services.
- (b) The Director/designate will ensure that the employee's work location is reviewed, and that an appropriate work location is *determined* in light of the preliminary investigation. Work locations may include:
 - the original work location,
 - home duty with pay,
 - alternate work location.

The employee may also be:

- suspended with pay,
- suspended without pay,
- terminated.

Prior to formulating any recommendations or decisions, the Director/designate may consult with legal counsel retained by the Board, and others as appropriate.

Note: For persons acting as **representatives** of the Board (see Appendix A), the services of the representative may be suspended from the time of the initial report to the Children's Aid Society or Police Services.

- (c) The Director/designate shall **NOT** interview the alleged offender or the pupil.
- (d) The Director/designate shall review the findings of the C.A.S./Police Services as they are made available. These findings are confidential as far as possible. Information may be received from and shared with the C.A.S./Police Services.
- (e) If **criminal charges** are laid, the Director/designate shall review the employee's work status and make recommendations to the Board, which may include:
 - the original work location,
 - home duty with pay,
 - alternate work location.

The employee may also be

- suspended with pay,
- suspended without pay,
- terminated.

- (f) Whether the Board employee is found guilty or not guilty of criminal charges, or if the criminal charges are dismissed, the Director will make a recommendation to the Board regarding continuance of employment, terms of employment and termination of employment.

Note: A report indicating all allegations of abuse against employees shall be made quarterly to the board, as well as at the first board meeting after which an allegation has been made.

APPENDIX A

I. DEFINITIONS

- 1. Child**
 - 2. Child Abuse**
 - 3. Duty to Report**
 - 4. Reasonable Grounds**
 - 5. Representative of the Board**
 - 6. Team (Protocol with C.A.S.)**
-

**II. LEGISLATION EXCERPTS FROM CHILD & FAMILY SERVICES ACT
-SECTIONS 37, 72 AND 85**

[Not Reproduced]

...

III. CHILD ABUSE PROTOCOL BETWEEN THE CHILDREN'S AID SOCIETY OF ALGOMA/CHILDREN'S AID SOCIETY OF SUDBURY MANITOULIN AND THE ALGOMA DISTRICT SCHOOL BOARD/THE HURON-SUPERIOR CATHOLIC DISTRICT SCHOOL BOARD.

1. DEFINITIONS

- 1. Child** - (Child and Family Services Act - August 1993 - Section 37(1)):
For the purpose of Reporting Abuse a child is a pupil under the age of 16 years unless the pupil is a ward of the Children's Aid Society. If the pupil is a ward of the Children's Aid Society a child is a pupil up to the age of 18 years.
- 2. Child Abuse** - (Child and Family Services Act - August 1993 - Section 37(2)) (See Page 14)

3. **Duty to Report** - (Child and Family Services Act - August 1993 - Section 72)
(See Over)
Children's Aid Society (Algoma) - (705) 949-0162;
Children's Aid Society (Sudbury) - (705) 522-8600
Children's Aid Society (Chapleau) - (705) 864-0329

Police Services:

Sault Ste. Marie City Police - (705) 949-6300
Elliot Lake City Police - (705) 848-6975
Espanola Town Police - (705) 869-3251
Michipicoten Town Police - (705) 856-2344
Ontario Provincial Police - Massey - 1-888-310-1122
Ontario Provincial Police - Blind River - 1-888-310-1122
Ontario Provincial Police - Chapleau - 1-888-310-1122

4. **Reasonable Grounds** - "Reasonable Grounds" means a set of facts or circumstances that would cause a person to form a strong belief.
5. **Representative of the Board** - A representative of the Board is an adult who is approved by the Board, Supervisory Officer, or principal, to be present and/or assist in a school/facility. This person is not paid a wage or salary by the Board, (i.e. volunteers, college students on placement, student teachers).
6. **Team (Children's Aid Society (C.A.S.) Protocol).***

"The investigating team will consist of a child protection worker and a police officer when necessary. Additional child protection staff and police officers may be required to assist the investigating team when circumstances warrant."

* The complete protocol is included in this appendix.

APPENDIX B

**CHILD ABUSE PROTOCOL BETWEEN
THE CHILDREN'S AID SOCIETY OF ALGOMA/CHILDREN'S AID SOCIETY
OF
SUDBURY-MANITOULIN
AND THE ALGOMA DISTRICT SCHOOL BOARD/
HURON-SUPERIOR CATHOLIC DISTRICT SCHOOL BOARD**

The Huron-Superior Catholic District School Board expects that its staff will act promptly for the protection of the children in the care of the Board, by reporting to the Children's Aid Society, whenever they encounter cases of suspected child abuse (*which must be regarded as an emergency of the utmost priority and such cases must be acted upon immediately*).

The Child Abuse Protocol between the Children's Aid Society of Algoma/Children's Aid Society of Sudbury-Manitoulin and the Algoma District School Board/Huron-Superior Catholic District School Board outlines procedures for reporting - as well as procedures expected of both school board personnel and the investigating team. The protocol has been reviewed by principals, staffs and O.E.C.T.A.

**III. CHILD ABUSE PROTOCOL BETWEEN THE CHILDREN'S AID SOCIETY OF
ALGOMA/CHILDREN'S AID SOCIETY OF SUDBURY-MANITOULIN AND THE
ALGOMA DISTRICT SCHOOL BOARD/HURON-SUPERIOR CATHOLIC
DISTRICT SCHOOL BOARD**

DUTY TO REPORT

The mandatory child abuse reporting requirement in Section 72 of the Child & Family Services Act applies to teachers, school principals, social workers and any other person "who in the course of his or her professional or official duties has reasonable grounds to suspect that a child is or may have suffered abuse, shall forth with report the suspicion and the information on which it is based to a Society." The intent of this reporting requirement is for the individual who has first-hand knowledge of the information to immediately contact a Children's Aid Society ideally within the first hour of hearing the information. This requirement takes precedence over all other relationships and reflects the intent of the legislation to protect children from abuse.

DEFINITION OF:

a) Child

The focus of this protocol is on children under 16 years of age. This reflects the primary mandate of child protection agencies in Ontario and specific provisions of the criminal code applicable to those children under 16 years.

b) Intra-familial/Extra-familial

References to intra-familial abuse include anyone related by blood, adoption or marriage to the child, or who stands *in loco parentis* of the child. Extra-familial refers to cases involving friends, acquaintances, strangers, or anyone not standing in an intra-familial relationship to the child.

c) Investigating Team

The investigating team will consist of a child protection counsellor and a police officer when necessary. Additional child protection staff and police officers may be required to assist the investigating team when circumstances warrant.

CHILD ABUSE

For the purpose of this protocol, the definition of child abuse used will relate to the definition found in Section 79 of the *Child & Family Services Act*. Abuse is interpreted as a state or condition of being physically harmed, sexually molested or sexually exploited. Emotional abuse can occur when a care giver permits the child to suffer from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development.

REPORTING PROCEDURES

All school teachers or any other district school board personnel who have reasonable and probable grounds to believe a child is in need of protective services shall immediately report the situation directly to the Children's Aid Society of Algoma or the Children's Aid Society of Sudbury-Manitoulin. The onus lies with the person who first hears the information or has concern to immediately make the report to the Children's Aid Society. School employees who have any information that causes them concern with regard to the potential of, or actually putting a child at risk of harm, must report the matter immediately to the Society.

School employees who are unsure as to whether the information they have warrants reporting will consult with the Children's Aid Society of Algoma and/or the Children's Aid Society of Sudbury-Manitoulin.

Any statement made by a child to a school employee should be recorded in the child's own words, but such recording should generally not occur in the presence of the child. School employees, while offering support, should refrain from initiating further interviews with the child after receiving the child's first disclosure.

Knowledge of a suspected case of child abuse is confidential and is to be restricted to the staff member initiating the report, the principal and if appropriate, personnel directly working with the child.

INVESTIGATIONS ON SCHOOL PREMISES

The investigating team will take into consideration factors (age of child, location of offender, etc.) that influence where the most appropriate place for the interview will be.

1. There are three situations where abuse investigations may occur on school premises:
 - a) where an intra-familial abuse is disclosed at school and reported immediately by school personnel to the Children's Aid Society;
 - b) where an abuse is disclosed outside the school and the child protection worker - Police team wish to interview the child at school due to the safety of the school setting; and
 - c) where the abuse disclosure involves school personnel as alleged offenders. (Wherever possible, the investigating team will attempt to have the interview take place in a neutral setting, away from the school.)
 2. In cases of extra-familial abuse, the investigating team in consultation with the principal will make arrangements for contacting the child's parent about the abuse prior to the child being interviewed. The investigating team will seek prior parental consent if it is deemed necessary to interview the child at school, encourage a parent to attend, and give the principal of the school sufficient advance notice of its desire to visit the school, and of the parents' consent to the interview.
 3. Where the team has determined the best interests of the child require that an interview take place without the prior knowledge and in the absence of the parents, an interview will be conducted at the school without prior parental consent in the following situations:
 - a) the team is investigating a reported case of suspected abuse;
 - b) the team is of the opinion, having considered other locations of interview, that it would be in the best interest of the child for the interview to take place within the school;
- The team will inform the parents of the interview before the student arrives home.
4. The team will ask the child if they wish to have their principal/teacher/school counsellor present at the interview in the school.
 5. The team shall provide to the principal sufficient information, as the investigation progresses to its conclusion, to enable school personnel to support the child and to continue the ongoing relationship between home and school. In particular, the team shall inform the principal as soon as possible:
 - a) when school personnel may resume contact with one or both parents;
 - b) if the child is placed in the care of the C.A.S.;

- c) whether or not child protection proceedings will be commenced;
 - d) whether or not criminal charges will be laid;
 - e) the existence and terms of any court orders regarding access by the parent(s) to the child;
 - f) if the investigation is delayed;
 - g) any other information which the team deems to be advisable.
6. Where the report involves a school employee as the alleged offender, the team will first contact the Director of Education or his/her designate and proceed with the investigation in co-operation with school board officials. School officials will not interview the alleged offender prior to the team's investigative interview. A school official will advise the individual that an investigation is about to take place and he/she may wish to seek advice from his/her federation/union when the team is about to interview the staff person. Once the Society has completed its investigation a letter will be sent to the Director of Education and copied to the employee involved, clearly outlining what the conclusion of the abuse assessment was with regard to the school employee.

PROTOCOL FOR REPORTING CHILD ABUSE

ALGOMA DISTRICT SCHOOL BOARD/

HURON-SUPERIOR CATHOLIC DISTRICT SCHOOL BOARD

THE UNDERSIGNED SIGNIFY THE INTENTION OF ALL NAMED AGENCIES TO FOLLOW THIS PROTOCOL FOR A CO-ORDINATED RESPONSE TO CHILD ABUSE IN THE ALGOMA DISTRICT SCHOOL BOARD AND THE HURON-SUPERIOR CATHOLIC DISTRICT SCHOOL BOARD

DATED this 29 day of March, 1999

**Ray DeRosario
Director of Education
Algoma District School Board**

**Hugh Nicholson
Executive Director
Children's Aid Society of Algoma**

**Cecile Somme
Director of Education
Huron-Superior Catholic District
School Board**

**Jacques Martel
Executive Director
Children's Aid Society of
Sudbury - Manitoulin**

APPENDIX C**"QUICK REFERENCE FOR REPORTING"**

1. TO Children's Aid Society (C.A.S.), if pupil is under 16 years of age, *unless the pupil is a ward of the Children's Aid Society*, then up to 18 years of age.
2. TO Police Services, if pupil is 16 years of age and up to 18 years of age.
3. TO Police Services and Children's Aid Society, for dated abuse, if alleged abuser still has some care/charge of children or a position of trust, with children under 16 years of age.

Please Note:

If the pupil is 18 years of age or older, the employee/representative of the Board, to whom a disclosure is made, is encouraged to support the pupil in reporting the incident/situation to the Police Services. The employee/representative shall consult with C.A.S. or Police Services. Such consultation is especially important if the alleged abuser has charge of or responsibility for children under the age of 16 years.

APPENDIX D**WHAT TO DO IF A CHILD DISCLOSES SEXUAL ABUSE****Suggestions for School Personnel from the Children's Aid Society**

Child abuse is a scary thing for many people, including teachers. When a child discloses that s/he is being harmed, the child is depending on you, the teacher/professional. Most disclosures are made to people whom the child trusts. Like it or not, you have been chosen by that child as someone who can be trusted and who can help. Above all, remember that this is a child who needs to be supported and believed, and that you can provide that support and belief.

If the Child Discloses to you:

- Do:
- Try to stay calm.
 - Reassure and support the child.
 - Statements like the following may be appreciated, but are not necessary. Make sure you demonstrate your support by speaking softly and warmly. Let the child talk, just be a supportive listener:
 - "I'm glad you told me; you did the right thing."
 - It's not your fault.
 - You're not alone, this happens to other children.
 - I have to tell some people (a social worker and a police officer) that this has happened. They will want to ask you some questions. They can help to make sure you're safe."(Remember, you can acknowledge how the child feels about this, but you cannot give her/him a choice.)
 - Tell the child that what you have been told concerns you and that you want to call someone you know that can help the child. Make sure you include that you are going to be with the child if that is what is wanted.
 - You should not ask for many details - that is the job of the trained professionals, the Children's Aid Society and the Police.

If a Child Discloses in the Classroom:

- Do:
- Acknowledge the statement (e.g. "That sounds important. We can talk about that later.") and move on.
 - Arrange to talk to the child privately and as soon as possible (e.g. recess).

- Inform the Children's Aid Society and principal immediately of the disclosure (without the child present).
- Stay with the child, particularly if s/he is upset.
- Make sure that the Children's Aid Society knows what the timelines are (e.g. when the child is expected at home) so the response plan can be prioritized accordingly.
- Wait to contact the parents until the Children's Aid Society/Police team have determined how and when this should occur.
- Stay with the child until the Children's Aid Society/Police team arrives at the school, recognizing that the child requires support during this period.
- Offer to stay with the child during the initial assessment and investigative interview.
- Check with the Children's Aid Society before allowing the child to go home if the interview has not yet taken place.

Note: Only the Children's Aid Society/Police should call or talk to the alleged offender.

After the Disclosure:

- Do:
- Talk to a colleague or someone you trust about your feelings. Disclosures are never easy to handle. You also need support.
 - Ask for the name of the Children's Aid Society's counsellor and his/her supervisor.
 - Feel free to call the Children's Aid Society's counsellor to find out the status of the assessment, the actions taken, to give further information, or to ask for advice on how to deal with the child.
 - Keep communication open with the child who will require ongoing support.
 - Respect the child's right to privacy by not identifying her/him to other staff.

DO NOT DELAY IN MAKING A REPORT. REMEMBER, IF YOU SUSPECT A CHILD HAS BEEN ABUSED IN ANY WAY, YOU ARE LEGALLY RESPONSIBLE FOR ENSURING THAT A REPORT IS MADE TO THE CHILDREN'S AID SOCIETY.

Children's Aid Society of Algoma
191 Northern Avenue East
SAULT STE. MARIE, ON P6B 4H8

Children's Aid Society of Sudbury-Manitoulin
1492 Paris Street
SUDBURY, ON P3E 3B8

ADOPTED Regular Meeting of the Board
Motion B-

DISTRIBUTION

- i) Trustees
 - ii) Administration
 - iii) Principals
 - iv) Teaching Personnel
 - v) Non-Teaching Staff
-

Huron-Superior Catholic District School Board

POLICY TITLE: GENERAL SEXUAL HARASSMENT POLICY

Approved: Feb.16/1999

POLICY NO: 7002

Page 1 of 18

POLICY**SEXUAL HARASSMENT:**

Whereas every employee/representative, and student has the right to freedom from work-related sexual harassment; and,

Whereas sexual harassment and discrimination are, not only illegal in a secular context, but totally inconsistent with the Catholic values of our system; and,

Whereas the Huron-Superior Catholic District School Board believes that the climate in the workplace must be one which recognizes and promotes a sense of dignity, mutual respect, and cooperation among all employees/representatives/students and encourages the development of an attitude of respect,

IT IS THE POLICY OF THE HURON-SUPERIOR CATHOLIC DISTRICT SCHOOL BOARD TO PROMOTE AND MAINTAIN A SUPPORTIVE ENVIRONMENT IN WHICH ALL EMPLOYEES/REPRESENTATIVES AND STUDENTS CAN WORK AND PARTICIPATE FREE FROM SEXUAL HARASSMENT.

GENERAL HARASSMENT:

Whereas every employee/representative, and student has the right to freedom from work-related harassment; and,

Whereas harassment and discrimination are, not only illegal in a secular context, but totally inconsistent with the Catholic values of our system; and

Whereas the Huron-Superior Catholic District School Board believes that the climate in the workplace must be one which recognizes and promotes a sense of dignity, mutual respect, and cooperation among all employees/representatives/students and encourages the development of an attitude of respect.

IT IS THE POLICY OF THE HURON-SUPERIOR CATHOLIC DISTRICT SCHOOL BOARD TO PROMOTE AND MAINTAIN A SUPPORTIVE ENVIRONMENT IN WHICH ALL EMPLOYEES/REPRESENTATIVES AND STUDENTS CAN WORK AND PARTICIPATE FREE FROM HARASSMENT.

HARASSMENT (SEXUAL AND GENERAL) PROCEDURES:**A. Philosophy:**

The Huron-Superior Catholic District School Board's mission statement states that, The Huron-Superior Catholic District School Board provides our students with quality education by promoting gospel values and enriching experiences in a safe and loving environment that will encourage each student to grow to his/her potential - spiritually, intellectually, physically, emotionally and morally.

B. Introduction:

Harassment is defined in accordance with the Ontario Human Rights Code as, "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome," and applies with respect to "race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap". Sexual Harassment for the purpose of this policy, is defined as one or a series of incidents in which an employee/representative or student receives attention of a sexual nature which could reasonably be considered offensive, intimidating, or hostile. Harassment may also involve activities which are directed at no one person in particular, but which create a "poisoned environment" - insults and jokes of a sexual nature, and the display of pornographic material,

A "poisoned environment" is harassment (general or sexual - depending on the nature) regardless of whether employees/representatives or students working in that environment choose to complain.

The Ontario Human Rights Code provides, under the following sections, that:

- 5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.
- 7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
- 7(3) Every person has a right to be free from,
 - (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or,

- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.
- 8 Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.
- 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Harassment	
General	Sexual
Harassment may include, but is not limited to:	
<ul style="list-style-type: none"> ● conduct, comment, gesture or contact which is known or ought reasonably to be known to be unwelcome by the person creating the conduct, comment, gesture or contact; ● demeaning comments which undermine self-respect; or ● the display or distribution of offensive material such as pictures, cartoons, and graffiti in schools and other Board premises. 	<ul style="list-style-type: none"> ● unwelcome sexual advances or requests for sexual favours; ● unwelcome behaviour of a sexual nature which places a condition on opportunities for learning, advancement, and achievement; ● a threat or reprisal when a sexual advance is rejected; ● verbal abuse or threats of a sexual nature; ● unwelcome gender-based remarks, jokes, innuendos, or taunting about a person's body, physical appearance, attire, or sex; ● unwelcome enquiries or comments about an individual's sex life; ● unwelcome invitations or requests of a sexual nature, whether indirect or explicit, or intimidation; ● leering or other gestures of a sexual nature; ● telephone calls with sexual overtones; or, ● unnecessary and unwanted physical contact such as touching, patting,

Note: Sexual harassment must not be confused with sexual assault. **Sexual assault** is any unwanted act of a sexual nature imposed by one person upon another. Sexual assault can happen to anyone - male or female - and IT'S AGAINST THE LAW.

Sexual assault is a serious criminal offence. It must be reported to the police. Allegations of sexual assault should be adjudicated by the courts, not by the Board.

City Agencies that might be called on for help, re: sexual harassment are:

- (a) Children's Aid Society (949-0162)
- (b) Child and Family Centre of the P.M.P.H. (Plummer Memorial Public Hospital) (759-3433)
- (c) Algoma Child and Youth Services (A.C.Y.S.) (945-5050)
- (d) Algoma Health Unit, e.g. School Nurse (759-5417)
- (e) Sexual Assault Care Centre of the P.M.P.H. (759-5143)

"Work-related harassment" is defined broadly to cover harassment which occurs

- (1) in the working environment;
- (2) anywhere else as a result of employment responsibilities, or employment relationships; or,
- (3) during any school-related activity.

It includes, but is not limited to, harassment

- on Board premises or a work site that is part of a Board program;
- in the course of a work assignment outside the Board premises or outside a work site that is part of a Board program;
- during work-related travel;
- at Board related social functions; or,
- during any school-related activity.

HARASSMENT IS NOT an occasional or casual compliment or any voluntary relationship nor normal exercise of supervisory responsibilities, including direction, counselling and discipline when necessary.

C. Resolution Procedures

It is the spirit of this policy to be preventative, not punitive. The procedures to be used in either general or sexual harassment are common.

I. PROCEDURES PERTAINING TO STUDENTS

INFORMAL PROCEDURE

All students have the right to bring forward a complaint in an atmosphere of respect and confidentiality without fear of embarrassment or reprisals. It is the responsibility of a board employee to bring forward to the principal/vice-principal any alleged incident of harassment of students of which he/she is aware, whether or not there is a complaint.

- i) The complainant should be encouraged to make known her/his disapproval or unease to the alleged harasser, where appropriate. An individual may not realize that an action is offensive and a simple discussion may resolve the problem. If the individual (alleged harasser) refuses to cooperate and further harassment occurs, remind him/her that the behaviour may be in violation of the Human Rights Code and Board Policy and that you may proceed to a further step.

OR

If the complainant is not able to approach the alleged harasser or if circumstances make it difficult to take this measure, the student should seek assistance as soon as possible from a trusted board employee who shall not deal with the alleged complaint but shall bring it to the attention of the school principal/vice-principal unless the alleged harasser is the principal/vice-principal. NOTE: Where the alleged harasser is the principal or vice-principal, the complaint shall become a formal complaint and shall be brought to the attention of the school superintendent.

- ii) It is the responsibility of the principal/vice-principal or staff member in whom the student confides to advise the complainant that he/she has the right to file a formal complaint. Parent(s)/Guardian(s) (if student is under the age of 18) must be informed as soon as possible.
- iii) If the student does not wish to file a formal complaint, the principal/vice-principal shall discuss the allegation with the alleged harasser and the complainant with a view to reaching a resolution.

The above should occur within 5 working days. (The timeline may be extended depending upon the circumstances.) Names should, as far as possible, remain confidential.

Many complaints can be satisfactorily resolved in this manner and the matter goes no further. (If the complaint is not satisfactorily resolved in this manner, the matter shall move to the formal procedure).

FORMAL PROCEDURE:

All students have the right to bring forward a formal complaint and to obtain a review of their complaint in an atmosphere of respect and confidentiality without fear of embarrassment or reprisals.

Upon receipt of a formal complaint, the principal/vice-principal shall ensure that regard is given to the following process (normally within thirty (30) working days of the complaint).

- i) Written complaints by the student or his/her advocate precisely outlining the allegations shall be directed to the principal/vice-principal unless the alleged harasser is the principal/vice-principal. The principal/vice-principal is empowered to initiate a harassment investigation. Where the alleged harasser is the principal/vice-principal, the complaint shall be brought to the attention of the school superintendent. Where the alleged harasser is a Superintendent, the complaint shall be directed to the Director of Education. Where the alleged harasser is the Director, the complaint shall be directed to the Chair of the Board who shall direct the complaint appropriately.
- ii) The alleged harasser shall be given a copy of the written statement of allegation by the student or his/her advocate as soon as possible and an opportunity to respond in writing and/or orally.
- iii) Where the alleged harasser is an employee/representative, he/she has the right to be accompanied by a Federation/Union/Association representative or advocate during interviews related to the complaint. Where the alleged harasser is a student under the age of 18, he/she must be accompanied by a parent(s)/guardian. Where the alleged harasser is a student 18 and over, he/she has the right to be accompanied by a parent(s) or advocate.
- iv) The investigation shall be conducted with regard for due process and confidentiality shall be maintained as far as is possible. The investigation shall consist of interviewing the parties, gathering facts, and preparing a report.
- v) Both parties (complainant and alleged harasser) shall be informed of the findings, in writing, without undue delay and normally within thirty (30) working days of the request. (A longer time may be deemed necessary to investigate the allegations and to respond to these.)

RESOLUTION:

Where a harasser is an employee/representative: the immediate supervisor shall be responsible for the choice and the implementation of the corrective measures, in the event such measures are in order.

Where the harasser is a student: the principal/vice-principal shall be responsible for the choice and the implementation of the corrective measures, in the event such measures are

in order.

A person who is found to have harassed a student shall be subject to the full range of disciplinary procedures - where the harasser is an employee: from letter of reprimand to termination of employment; where the harasser is a student: from letter of discipline to recommendation for expulsion.

The actions recommended shall be based on an assessment of the following factors: seriousness and frequency of the incidents, damage to the victim, past disciplinary record of the harasser, and the harasser's cooperation and willingness to change.

The report of disciplinary action resulting from a harassment complaint shall be placed in a sealed envelope in the employee's central personnel file or shall be placed in the student's OSR (Ontario Student Record Card). The length of time that the disciplinary action shall remain in the file shall be determined by the supervisor, as part of the disciplinary action.

APPEAL:

- i) Both the complainant and the alleged harasser have the right to appeal the decision. An appeal must be made in writing within 15 working days to the immediate supervisor of the person making the decision.
- ii) An appeal under this section shall be reviewed by the immediate supervisor of the person making the decision, who shall have the authority to conduct any further investigation as may be deemed appropriate. The results of any further investigation shall be shared, in writing, with both the complainant and the alleged harasser. Based on the review, the supervisor may confirm, reverse, or modify the decision appealed.
- iii) The supervisor's decision can be appealed, in writing, to the Board within 15 working days. The appeal shall be held at an In-Committee meeting. The complainant and the alleged harasser have the right to attend. (See Section D, re: Procedure Governing Appeal Presentations To The Board.)

II. PROCEDURES PERTAINING TO EMPLOYEES/REPRESENTATIVES

STEP 1: PRELIMINARY PROCEDURE

All persons have the right to bring forward a complaint and to obtain a review of their complaint in an atmosphere of respect and confidentiality without fear of embarrassment or reprisals.

Inform the alleged harasser that his/her behaviour is unwelcome. An individual may not realize that an action is offensive, and a simple discussion may resolve the problem. If the individual (alleged harasser) refuses to cooperate and further harassment occurs, remind him/her that the behaviour may be in violation of the Human Rights Code and Board Policy and that you may proceed to a further step.

STEP 2: INFORMAL PROCEDURE (NORMALLY WITHIN 5 WORKING DAYS OF STEP 1. THE TIME LINE MAY BE EXTENDED.)

- i) Maintain a record of the dates, times, locations and actions of the alleged harassment. Failure to keep a written record shall not invalidate a complaint.
- ii) The complainant should contact a supervisor, principal or superintendent with whom he/she feels comfortable to discuss the alleged harassment and how it may be resolved.
- iii) With the agreement of the complainant, the supervisor, principal or superintendent may choose alternatives such as:
 - arrange a meeting between the two parties to seek a resolution of the matter;
 - meet with the alleged harasser to seek resolution;
 - recommend that the complaint be stated in writing to the alleged harasser requesting that the behaviour cease;
 - recommend that the complainant seek assistance through the Employee Assistance Program; or,
 - recommend that the complaint be moved to the Formal Procedure.

STEP 3: FORMAL PROCEDURE (NORMALLY WITHIN 5 WORKING DAYS OF STEP 2. THE TIME LINE MAY BE EXTENDED.)

- i) Written complaints precisely outlining the allegations shall be directed to the person's supervisor unless the alleged harasser is that person's supervisor in which case the complainant may submit a formal, written complaint to the next immediate supervisor.

The alleged harasser shall be given a copy of the written statement of allegation by the complainant or his/her advocate as soon as possible and an opportunity to respond in writing and/or orally.

- ii) Where the alleged harasser is an employee/representative, he/she has the right to be accompanied by a Federation/Union/Association representative or advocate during interviews related to the complaint.
- iii) The investigation shall be conducted with regard for due process and confidentiality shall be maintained as far as is possible. The investigation shall consist of interviewing the parties, gathering facts, and preparing a report.
- iv) Both parties (complainant and alleged harasser) shall be informed of the findings, in writing, without undue delay and normally within thirty (30) working days of the request. (A longer time may be deemed necessary to investigate the allegations and to respond to these.)

RESOLUTION:

Where a harasser is an employee/representative: the immediate supervisor shall be responsible for the choice and the implementation of the corrective measures, in the event such measures are in order.

Where the harasser is a student: the principal/vice-principal shall be responsible for the choice and the implementation of the corrective measures, in the event such measures are in order.

A person who is found to have harassed an employee/representative shall be subject to the full range of disciplinary procedures - where the harasser is an employee: from letter of reprimand to termination of employment; where the harasser is a student: from letter of discipline to recommendation for expulsion.

The actions recommended shall be based on an assessment of the following factors: seriousness and frequency of the incidents, damage to the victim, past disciplinary record of the harasser, and the harasser's cooperation and willingness to change.

The report of disciplinary action resulting from an harassment complaint shall be placed in a sealed envelope in the employee's central personnel file or shall be placed in the student's OSR (Ontario Student Record Card). The length of time that the disciplinary action shall remain in the file shall be determined by the supervisor, as part of the disciplinary action.

APPEAL:

- i) Both the complainant and the alleged harasser have the right to appeal the decision. An appeal must be made in writing within 15 working days to the immediate supervisor of the person making the decision.
- ii) An appeal under this section shall be reviewed by the immediate supervisor of the person making the decision, who shall have the authority to conduct any further investigation as may be deemed appropriate. The results of any further investigation, in writing, shall be shared with both the complainant and the alleged harasser. Based on the review, the supervisor may confirm, reverse, or modify the decision appealed.
- iii) If resolution has not occurred, a report shall be prepared, re: complaint, and referred to a panel made up of a trustee, Director of Education or designate, and an official who has not previously been involved. This panel shall hear from all parties. The parties may wish to have representation from their employee organizations. The panel shall prepare a report and decide to:
 - dismiss or uphold the complaint;
 - discipline an employee/representative, which may range from reprimand to suspension or termination of employment/placement, depending upon the severity of the incident; or,
 - with the consent of the complainant, refer the matter to the Ontario Human Rights Commission.

- (iv) The panel's decision may be appealed, in writing, to the Board within 15 working days. The appeal shall be held at an In-Committee meeting. The complainant and the alleged harasser have the right to attend. (See Section D, re: Procedure Governing Appeal Presentations To The Board.)

D. GENERAL INFORMATION:

RESPONSIBILITIES OF PRINCIPALS/SUPERVISORS

It is the responsibility of all principals/supervisors to take measures to address any harassment of which they are aware - whether or not there is a complaint.

It is the responsibility of all principals to make new staff members aware of the policies and procedures pertaining to this harassment policy.

It is the responsibility of senior staff to ensure that new appointees to principal positions are aware of their responsibilities under this policy.

Failure to take measures to address harassment in the workplace has legal implications for the employer (Board). *Ontario Human Rights Code*, Section 41(2). (See appendix.)

CONFIDENTIALITY:

All policies and management practices are subject to the *Municipal Freedom of Information and Protection of Privacy Act*.

All information provided during an investigation shall remain confidential, subject to the requirement to disclose information or give evidence according to the law. No person shall be permitted to discuss the complaint or the resulting investigation, except for discussions necessary to conduct the investigation and make a decision.

USE OF RECORDS:

There shall be no record in the complainant's personnel file/OSR of that individual complaint against an alleged harasser.

In the event that the complaint is supported, a summary report of the investigation and any disciplinary measures taken must be placed in the personnel file/Ontario Student Record of the harasser. The complainant's name must be blocked out of any report which is placed on the harasser's file.

In the event that the complaint is not supported, no report of the investigation shall be placed in the alleged harasser's personnel file/OSR.

Whether the complaint is supported or not supported, the notes of the investigation and any notes relating to the complaint must be sent to the office of the Director of Education for retention, in a file named "Harassment", for a minimum ten (10) year period. The alleged

harasser and complainant must be notified, in writing, of the collection of this personal information.

PROCEDURE GOVERNING APPEAL PRESENTATIONS TO THE BOARD:

The written complaint and other pertinent documentation shall be placed on the In-Committee portion of the Board's Agenda. The complainant shall have the right to appear before the Board to present the complaint. If the complainant chooses to appear before the Board, the person against whom the complaint was made shall have the same privilege of appearing before the Board to make a presentation. The procedure governing the presentations shall be as follows:

- (i) The complainant shall have fifteen (15) minutes to speak to the written complaint in order to clarify any elements of the complaint. Items or issues not contained within the written complaint shall not be discussed.
- (ii) The person against whom the complaint has been made shall have fifteen (15) minutes to respond to the complaint.
- (iii) The trustees shall have up to thirty (30) minutes to ask clarification questions of both parties. No discussion on the complaint shall take place at this time.
- (iv) The parties involved in the complaint shall leave the Board Room after the question period, and the trustees shall discuss the complaint and determine the Board's response.
- (v) The Board shall communicate its final disposition of the complaint, in writing, to all parties at a later date.

THREATS OR REPRISALS:

Threats or reprisals for having

- (a) invoked this policy (whether on behalf of oneself or another individual);
- (b) participated or cooperated in any investigation under this policy; or,
- (c) been associated with a person who invoked this policy or participated in these procedures,

are in violation of this policy and the Ontario Human Rights Code, and shall be treated as harassment.

OBLIGATION TO REPORT INCIDENTS OF HARASSMENT:

Failure of a complainant to lodge a complaint does not absolve the Board of its obligation to resolve any possible incidents of harassment. A formal investigation may be conducted

in the following cases, even in the absence of a complaint lodged by the complainant:

- (1) where a person in a position of responsibility is made aware of (an) incident(s) of harassment, the incident(s) shall be reported to the appropriate supervisor or superintendent who shall initiate a formal investigation;
- (2) where a person witnesses harassment, the witness is encouraged to report the incident to the appropriate supervisor or superintendent;
- (3) where, after a serious incident, an individual refuses to lodge a complaint, the incident shall be investigated by the appropriate supervisor or superintendent; or,
- (4) where, over a period of time, a series of complaints, although all separate, are made against the same person, the incidents shall be investigated by the appropriate supervisor or superintendent.

REDRESS OPTIONS:

It is not the intent of this policy to prevent an employee/representative/student from seeking alternative methods of redress, either through his or her union, collective agreement grievance procedure, professional association, Human Rights Commission, or another outside agency.

Individuals retain the right to approach the Ontario Human Rights Commission at any time, subject to the provisions set out in the Ontario Human Rights Code. If an individual takes a complaint to the Ontario Human Rights Commission or initiates legal procedures, the Board's procedures may be suspended until these other complaint procedures are completed.

Appendix

Definition of Representative of the Board

Representative of the Board - A representative of the Board is an adult who is approved by the Board, Supervisory Officer, or principal, to be present and/or assist in a school/facility. This person is not paid a wage or salary by the Board, (i.e. volunteer, co-op student, college student, student teacher).

Ontario Human Rights Code, Section 41(2)

"Where a board makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2 (2) or subsection 5 (2) or conduct under section 7, and the board finds that a person who is a party to the proceeding,

- (a) knew or was in possession of knowledge from which the person ought to have known of the infringement; and
- (b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it,

the board shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 36 (2), request the board to re-convene and if the board finds that a person who is a party to the proceeding,

- (c) knew or was in possession of knowledge from which the person ought to have known of the repetition of infringement; and
- (d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it,

the board may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right."

ADOPTED Regular Meeting of the Board February 16/99
Motion B-42

DISTRIBUTION

- i) Trustees
 - ii) Administration
 - iii) Principals
 - iv) Student Councils
-



**MEMORANDUM OF UNDERSTANDING
WITH RESPECT TO
THE DISCLOSURE AND EXCHANGE OF
INFORMATION**

Under Section 41(1.2) of the *Police Services Act* R.S.O. 1990, as amended
and Regulation 265/98 thereunder

BETWEEN:

THE SAULT STE. MARIE POLICE SERVICE
(hereinafter referred to as the "Police Service")

-and-

THE HURON-SUPERIOR CATHOLIC DISTRICT SCHOOL BOARD
(hereinafter referred to as the "Agency")

WHEREAS *The Huron-Superior Catholic District School Board*

is an agency engaged in

- the protection of the public through compliance with and enforcement of:

The Education Act

R.S.O. 1990

in the Municipality of **Sault Ste. Marie** in the Province of Ontario;

AND WHEREAS in accordance with the provisions of section 5 of Regulation 265/98 under the *Police Services Act* R.S.O. 1990, as amended, the Chief of Police or Designate of the Police Service may disclose personal information about an individual if the individual is under investigation for, charged with, or convicted or found guilty of, an offence under the *Criminal Code* (Canada), the *Controlled Drugs and Substances Act* (Canada) or any other federal or provincial Act to a person or agency engaged in the protection of the public, the administration of justice or the enforcement of or compliance with any federal or provincial Act, regulation or government program, where such disclosure is required for the protection of the public, the administration of justice or the enforcement or compliance with any federal or provincial Act, regulation or government program;

AND WHEREAS section 5(3) of Regulation 265/98 requires that where information is to be shared with an agency engaged in the enforcement of or compliance with any federal or provincial Act, regulation or government program, a memorandum of understanding must be entered into between the Chief of Police and the agency;

AND WHEREAS the Chief of Police of the Police Service is willing to share information with the Agency where the Agency is specifically engaged in the protection of the public and/or the enforcement of or compliance with any federal or provincial Act, regulation or government program upon the terms specified herein;

AND THEREFORE the parties to this Memorandum of Understanding agree with each other as follows:

PURPOSE

1. This Memorandum of Understanding has been developed and executed by the parties to specify the conditions and procedures for the sharing of information between the Police Service and the Agency, where the Agency is engaged in activities which are for the purpose of the protection of the public and/or the enforcement of or compliance with any federal or provincial Act, regulation or government program, as specified above.

TERMS OF SHARING OF INFORMATION:

2. The Police Service will provide information only where it is determined that such information is required for the purpose of the protection of the public or for the enforcement of or compliance with any federal and provincial Act, regulation or government program. The Police Service shall make this determination in its discretion.
3. The Agency shall be required to provide the Police Service with the reason(s) for which information is sought, satisfactory to the Police Service, in relation to each request.
4. The Agency shall designate one or more authorized representatives, who shall act as the contacts between the Agency and Police Service for the purposes of information sharing. The names of the authorized contacts shall be provided to the Police Service, in writing. Where the Agency wishes to substitute new or additional authorized contacts, the Police Service shall be advised, in writing, prior thereto.
5. The member of the Police Service who shall be the contact person for information sharing with the Agency shall be the Inspector of Investigation Services or his/her designate Detective Sergeant Investigation Services.
6. It is understood and agreed that a decision as to whether or not information shall be disclosed in accordance with Regulation 265/98 under the *Police Services Act* is within the discretion of the Chief of Police. Furthermore, the extent and nature of information which may be released to the Agency shall be determined by the Police Service, in its absolute discretion, and may be in written or verbal form.

CONFIDENTIALITY AND LIMITATIONS

7. The Police Service reserves the right to sever, in its discretion, any information prior to its release to the Agency, to protect the privacy interest of third parties and confidential informants, and to prevent any interference with law enforcement or revelation of law enforcement techniques, in accordance with the principles contained in the *Municipal Freedom of Information and Privacy Act*, R.S.O. 1990, as amended.
8. The Agency agrees that any information which is provided to it under the terms of this Memorandum of Understanding shall be used only for the purposes specifically authorized herein; namely, for the protection of the public or the government program specified above.
9. Any records maintained by the Police Service in accordance with the provisions of the *Young Offenders Act*, R.S.C. 1985, c. Y-1 as amended, shall not be disclosed under the provisions of this Memorandum of Understanding. It is recognized that records of young offenders may only be disclosed in accordance with the provisions of the *Young Offenders Act*.

10. The Agency undertakes to maintain, respect and protect the confidentiality of the information disclosed to it pursuant to this Memorandum of Understanding, and undertakes not to release or disclose any such information unless such release is clearly authorized by law.
11. Where information is released in written form, the Agency undertakes that such information shall be maintained and stored in a secure location.
12. The Agency shall develop and implement any policies ad practices which are necessary to ensure that the terms of this Memorandum of Understanding are respected.
13. In the event that the Agency operates under the auspices of the federal *Access to Information Act* or *Privacy Act*, the provincial *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, all information disclosed to the Agency shall be maintained and destroyed in accordance with the provisions of the applicable legislation and the retention schedule of the Agency.

TERM OF AGREEMENT

14. This Memorandum of Understanding hall become effective on the date on whic' it is signed by the last of the signatories hereto.
15. This Memorandum of Understanding shall continue in effect until terminated in accordance with the provisions of paragraph 16 or, without cause by either party giving thirty (30) days written notice to the other.
16. The Chief of Police of the Police Service reserves the right to terminate this Memorandum of Understanding at any time, without prior notice, upon determination that a breach of confidentiality or a breach of any of the terms of the agreement has occurred, or for any other reason, in his/her discretion.
17. This Memorandum of Understanding may be amended upon the written agreement of the parties.
18. All correspondence or other notices related to the terms of this Memorandum of Understanding shall be delivered as set forth below:

*Chief Robert D. Davies
Sault Ste. Marie Police Services
580 Second Line East
Sault Ste. Marie Ontario P6A 5L6*

*Dr. Cecile Somme
Director of Education
Huron-Superior Catholic District School Board
90 Ontario Avenue
Sault Ste. Marie Ontario P6B 6G7*

[signature page not reproduced]



Policy of the Toronto District School Board
Number C.07 - Dealing with Abuse and Neglect of Students

Statement

The Toronto District School Board is committed to providing each and every student with a safe, nurturing, positive and respectful learning environment.

Every year, thousands of cases of child abuse and neglect are reported to child welfare authorities in Toronto. Both the Ontario Child and Family Services Act and the Criminal Code of Canada demonstrate our society's commitment to protecting children from abuse and neglect. The employees of the Toronto District School Board have a special role and responsibility in the protection of children and students of all ages.

Whether a child suffers from physical, sexual or emotional abuse or is a victim of neglect, the long-term effects can be enormous. Increased rates of suicide, addiction, and mental health disorders of all kinds are directly related to child abuse or neglect. Experience has shown that it is not only younger children who are victims of abuse, but that older students can also be victimized in the home, at school, or in the community.

The Toronto District School Board has a duty to prevent, detect, intervene in and report abuse or neglect of any students.

Early identification of child abuse and neglect can occur through disclosure or as the result of reasonable suspicions on the part of Board employees and volunteers. Reporting disclosures or suspicions may not only prevent future victimization of children, it may also permit both the victim and perpetrator to receive the help they need. Early intervention may ameliorate the long-term effects of abuse and break the ongoing cycle of further victimization and harm.

By pursuing an integrated program of prevention education and intervention and by providing the necessary resources to support these initiatives for all students, we will demonstrate the Board's commitment to the goal of eradicating abuse and neglect.

The Toronto District School Board, therefore, shall have zero tolerance in all of its learning environments for physical, sexual and emotional abuse and/or neglect of students.

For the purpose of this policy, abuse is any form of physical harm, sexual mistreatment, emotional harm, or neglect, which can result in injury or psychological damage. The four categories of abuse of students are described in the procedures document.

1. Principles

- (a) No student shall experience corporal punishment, physical mistreatment, sexual, emotional or verbal abuse by staff. In addition, students shall be protected from violence and harassment, including threats and/or bullying and inappropriate sexual behaviour by other students.

- (b) The Toronto District School Board will educate all of its students about their right to live without fear of physical, sexual, and emotional abuse and neglect and will support disclosure of such abuse.
- (c) The Toronto District School Board will establish a series of age-appropriate programs in the elementary and secondary panels to explicitly educate all of its students about the issues of abuse and neglect. In addition, the Board will educate all its employees, volunteers and parents about the issues of abuse and neglect and their duty to maintain safe and abuse-free learning environments. While the Board respects the diversity of its school communities, child abuse prevention and reporting practices must be consistent with Canadian law.
- (d) The Toronto District School Board will hold all employees and volunteers accountable for the following:
 - (i) Board staff and volunteers working directly with a student of any age in their professional capacity (see (c) below) will not enter into a sexual relationship with that student during the course of the professional relationship or for a period of one year thereafter.
 - (ii) In the case of students and former students under the age of 18, any such relationship, in addition to being a serious breach of Board policy, is also a criminal offence of sexual exploitation or sexual assault.
 - (iii) Professional capacity shall mean working or volunteering in the same school as the student is enrolled or otherwise supervising, counselling, coaching or assisting in extra curricular activities in which the student is participating regardless of which school the student is enrolled.
- (e) The Toronto District School Board will ensure that all prospective employees are screened for records of criminal conviction for sexual offences and offences involving children.

2. Detecting and Reporting Abuse or Neglect

- (a) All Toronto District School Board employees and volunteers must remain vigilant about neglect and abuse. In the event a Toronto District School Board employee or volunteer suspects that abuse or neglect has occurred, the employee or volunteer will forthwith report her/his suspicions to the police and/or a children's aid society in accordance with the procedures attached to this policy and in compliance with the Child and Family Services Act. The legal responsibilities under the Child and Family Services Act are described in the administrative procedures.
- (b) All employees are expected to support victims of abuse and neglect in accordance with the procedures attached to this policy.

- (c) All student disclosures shall be reported to the police and/or children's aid
- (d) The dignity and all legal rights to privacy of those affected by an abuse disclosure will be respected.
- (e) Where the alleged perpetrator of abuse is an adult, every effort will be made to protect the student in the learning environment from further contact or reprisals by the adult.
- (f) If a Board employee is convicted of abusing a student or if an internal investigation determines, on a balance of probabilities, that the employee abused a student, the employee will be dismissed from employment. Any volunteer found to have abused a student will no longer be permitted to volunteer.
- (g) Where the alleged perpetrator is a student, he/she will be separated from the alleged victim and, where appropriate, an alternative learning environment and support and counselling will be provided.

3. Sexually Intrusive Behaviour By Students

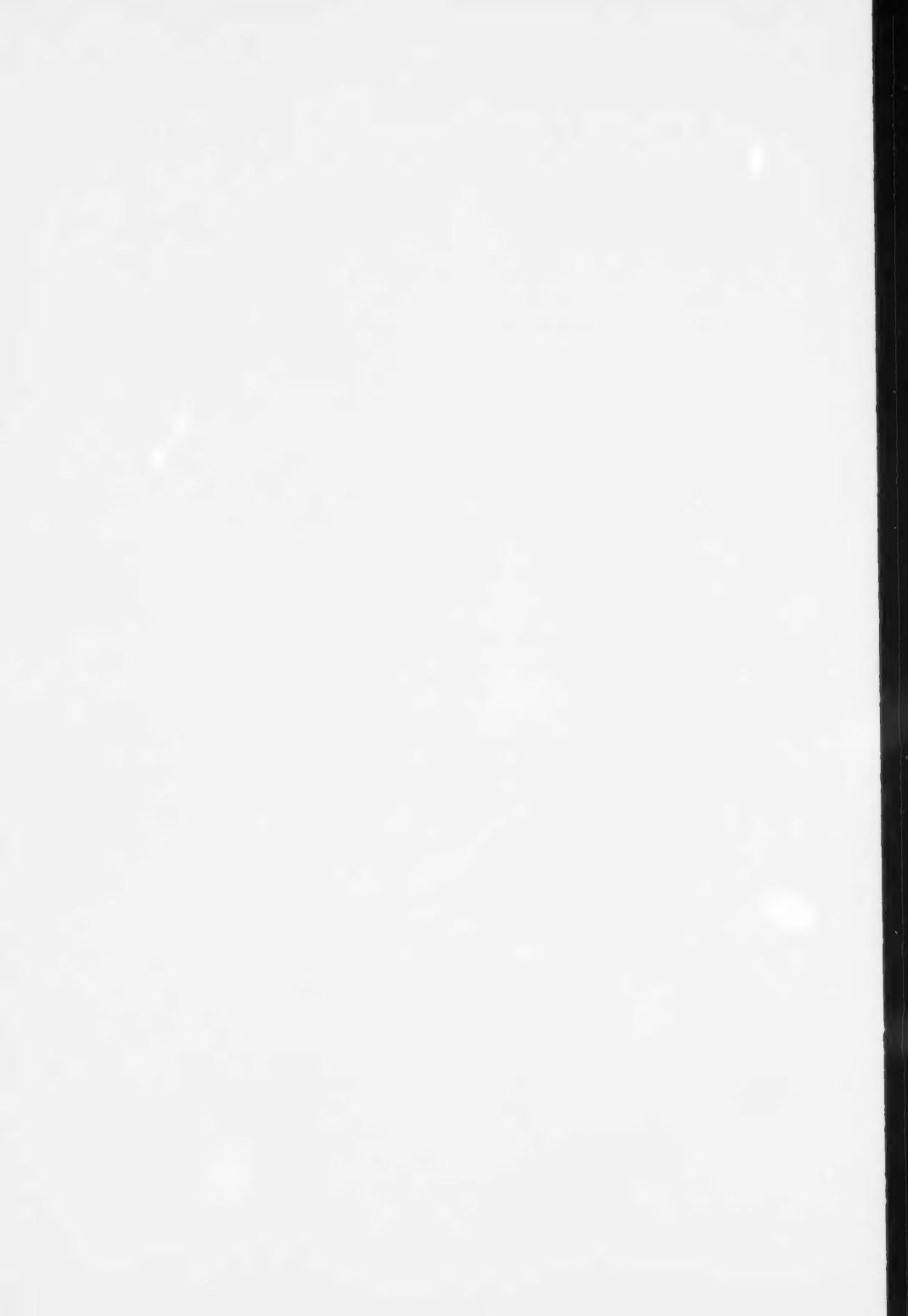
The Toronto District School Board also recognizes that not all perpetrators of abuse are of the age of criminal responsibility and that sexually intrusive behaviours can occur between students of all ages. For the purpose of this policy sexual intrusion includes behaviour of a sexual nature that may put a child or children at risk of physical or emotional harm. These include any behaviours for which a person over the age of 12 might be charged under the Criminal Code. Other sexually problematic behaviours include persistent sexually explicit talk or enactments, sex play between children of different ages or developmental levels and the inability of a child to stop engaging in sexual behaviour.

The Toronto District School Board will offer support for both victims and perpetrators of sexually intrusive behaviour.

4. After Abuse is Reported

Where abuse has been reported, the Toronto District School Board will co-operate fully with the investigating agency. In the case of child sexual abuse, the Toronto Child Sexual Abuse Protocol (MCSA) will be followed.

The Toronto District School Board is committed to the goal of obtaining appropriate emotional and psychological support for all victims of neglect and abuse and for their families. In addition, where appropriate, support and as much information as may be legally shared will be provided to the greater school community. In some sexual abuse situations, a response team will be convened to provide support to the school and the community. The response team will draw upon designated staff who are trained in sexual abuse issues.



TORONTO DISTRICT SCHOOL BOARD

Section D Student Health and Welfare	Procedure 001 Dealing with abuse and Neglect of students
Date: October 27, 1999	Department: Student and Community Services

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APPENDICES

Record of Report of Abuse/Neglect-Form D: 001A

Checklist for Formal Reports of Child Abuse/Neglect

**Possible Indicators of Child Abuse
[Reproduced in Part]**

**Student and Community Services Co-ordinators
[Not Reproduced]**

1. Definitions

1.1. **ABUSE** is any form of physical harm, sexual mistreatment, emotional harm, or neglect, which can result in injury or psychological damage. The four categories of **Child Abuse** are described below.

PHYSICAL ABUSE occurs when the person(s) responsible for the child's care, inflicts or allows to be inflicted any injury upon the child. Behavioural or physical indicators may be helpful in offering clues that a child may have been abused.

SEXUAL ABUSE refers to the use of a child or youth by an adult for sexual purposes whether consensual or not. Sexual abuse can also occur among children or youth where there is a lack of consent, or, among children even with consent, where there is an age gap of more than two years.

EMOTIONAL ABUSE or psychological maltreatment occurs when the person(s) responsible for the child's care either subjects the child to or permits the child to be subjected to, chronic and persistent ridiculing or rejecting behaviour.

NEGLECT is the result of serious inattention or negligence on the part of a child's care giver to the basic physical and emotional needs of the child. Child neglect may be easily confused with poverty or ignorance, or may be associated with parents who are overwhelmed with other problems. However, because chronic neglect results in physical and emotional harm to a child, it cannot be ignored, whatever its cause. Neglect occurs when the person(s) responsible for the child's care jeopardizes that care or well-being through deprivation of necessities.

1.2. Sexual Offences As Defined By The Criminal Code

SEXUAL ASSAULT

271. (1) Every one who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or*
- (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.*

Sexual assault is an assault which is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one:

whether viewed in the light of all the circumstances the sexual or carnal context of the assault is visible to a reasonable observer. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant. The intent or purpose of that person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. The existence of such a motive is, however, merely one of many factors to be considered.

SEXUAL INTERFERENCE

151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

No crime is committed, however, if two young people over the age of 12 consent to sexual activity and the older teen is under 16 years and there is less than 2 years age difference between the two.

INVITATION TO SEXUAL TOUCHING/DEFINITION OF "YOUNG PERSON"

152. Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of fourteen years, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

SEXUAL EXPLOITATION

153. (1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who

- (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or*
- (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,*

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.

(2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

1.3. Sexual Behaviour Problems of Children Under 12

Sexual behaviour problems are behaviour problems of a sexual nature that may put a child or children at risk of physical or emotional harm. These include any behaviours for which a young person over the age of 12 might be charged under the Criminal Code. Other sexually problematic behaviours include persistent sexually explicit talk or enactments, sex play between children of different ages or developmental levels and the inability of a child to stop engaging in sexual behaviour.

2. Legal Responsibilities Under the Child and Family Services Act

2.1. Duty to Report (C.F.S.A. Section 72(1))

The Child and Family Services Act states that "if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall forthwith report the suspicion and the information on which it is based to a society:

1. The child has suffered physical harm, inflicted by the person having charge of the child or caused by or resulting from that person's
 - (a) failure to adequately care for, provide for, supervise or protect the child, or
 - (b) pattern of neglect in caring for, providing for, supervising or protecting the child.
2. There is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child or caused by or resulting from that person's
 - (a) failure to adequately care for, provide for, supervise or protect the child, or
 - (b) pattern of neglect in caring for, providing for, supervising or protecting the child.
3. The child has been sexually molested or sexually exploited, by the person having charge of the child or another person where the person having charge of the child knows or should know of the possibility of sexual molestation or sexual exploitation and fails to protect the child.
4. There is a risk that the child is likely to be sexually molested or sexually exploited as described in paragraph 1.3.

5. The child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to the treatment.
6. The child has suffered emotional harm, demonstrated by serious
 - (a) anxiety
 - (b) depression
 - (c) withdrawal
 - (d) self-destructive or aggressive behaviour, or
 - (e) delayed development.
7. The child has suffered emotional harm of the kind described in the subparagraphs of 1.6 and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.
8. There is a risk that the child is likely to suffer emotional harm of the kind described in the subparagraphs of 1.6 resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.
9. There is a risk that the child is likely to suffer emotional harm of the kind described in the subparagraphs of 1.6 and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.
10. The child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide or refuses or is unavailable or unable to consent to, treatment to remedy or alleviate the condition.
11. The child has been abandoned, the child's parent has died or is unavailable to exercise his or her custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in a residential placement and the parent refuses or is unable or unwilling to resume the child's care and custody.
12. The child is less than 12 years old and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to those services or treatment.
13. The child is less than 12 years old and has on more than one occasion injured another person or caused damage to another person's property, with the

encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately.

2.2. Ongoing Duty to Report (C.F.S.A. Section 72(2))

A person who has additional reasonable grounds to suspect one of the matters set out in subsection 72 (1) above shall make a further report under subsection (1) even if he or she has made previous reports with respect to the same child.

2.3. Person Must Report Directly (C.F.S.A. Section 72(3))

A person who has a duty to report a matter under subsection (1) or (2) above shall make the report directly to the society and shall not rely on any other person to report on his or her behalf.

The professional duty to report overrides the provisions of any other provincial or federal statute, e.g. Education Act, Young Offenders Act, Mental Health Act, Criminal Code of Canada, s. 18(1)(b) of the Regulation under the Teaching Professions Act.

2.4. Penalty for Failure to Report (C.F.S.A. Sections 72(4) and 72(5)) (Applicable to "professional" only, see bold below)

Section 72(4)

A person referred to in subsection (5) below is guilty of an offence if,

- (a) he or she contravenes subsection (1) or (2) by not reporting a suspicion; and
- (b) the information on which it was based was obtained in the course of his or her professional or official duties.

Section 72(5)

Subsection (4) applies to every person who performs professional or official duties with respect to children including,

- (a) A health care professional, including a physician, **nurse**, dentist, pharmacist and **psychologist**;
- (b) a **teacher**, **school principal**, **social worker**, family counsellor, priest, rabbi, member of the clergy, operator or employee of a day nursery and youth and recreation worker;
- (c) a peace officer and a coroner;
- (d) a solicitor; and
- (e) a service provider and an employee of a service provider.

A professional who does not report suspected child abuse as required by Sections 72(1) and 72(2) of the Child and Family Services Act is guilty of an offence, and upon conviction, is liable to a fine of not more than \$1,000 (C.F.S.A. s.85(1)) or, except in the case of contravention of subsection 72(3) to imprisonment for a term of not more than one year, or to both.

2.5. Protection for Persons Reporting

Board employees or volunteers who report suspicions of child abuse are afforded protection from the consequences of any legal proceedings which may be brought by the parents or on behalf of the child, provided the reporting is not done maliciously or without reasonable grounds (Section 72(7) of the C.F.S.A.)

3. Procedures Dealing With Abuse and Neglect: Victim is Student Who is Under the Age of 16, Alleged Perpetrator is Outside of School System¹

[NOT REPRODUCED]

4. Procedures Dealing With Sexual Abuse and/or Sexual Assault: Victim is Student Who is Under the Age of 16, Alleged Perpetrator is Board Employee or Volunteer

4.1. Board Policy on Sexual Relationships Between Staff and Students/Former Students

- 4.1.1. Board staff/volunteers working directly with a student of any age in their professional capacity (see 4.1.3. below) will not enter into a sexual relationship with that student during the course of the professional relationship or for a period of one year thereafter.
- 4.1.2. In the case of students/former students under the age of 18, any such relationship, in addition to being a serious breach of Board policy, is also a criminal offence of sexual exploitation or sexual assault.
- 4.1.3. Professional capacity shall mean working or volunteering in the same school as the student is enrolled or otherwise supervising, counselling, coaching or assisting in extra curricular activities in which the student is participating regardless of which school the student attends.

¹ If the alleged perpetrator is a Board employee, refer to Section 4.

4.2. Notice to Board Resource Person/Convening a Response Team

The principal or designate will immediately contact one of the following child abuse resource persons so that a response team can be convened to assist the school. In most cases, this response team will be comprised of a representative of the Communications and Public Affairs Office, the appropriate school superintendent, a social worker, and the principal or designate of the school. The response team will use Board staff who are specialists in sexual abuse/sexual assault issues to implement any intervention in the school including informing students and staff, counsellng students and staff and providing advice to parents.

When a response team has been established under this procedure, the team shall designate a member of the team whose responsibility shall be to liaise with, on an ongoing basis, and assist the police.

**Toronto District School Board
Child Abuse Resource Persons (see page 52)**

4.3. Reporting to Children's Aid Society and Police

The responsibility to report to C.A.S. lies with the employee or volunteer who received the disclosure or who suspected the abuse/neglect.

4.3.1. Inform the Principal or Designate

- Report to the principal or designate what you suspect or what has been disclosed to you.
 - The principal or designate will immediately notify the appropriate superintendent.
- Under no circumstances shall the implicated staff member be contacted regarding allegations or disclosures until specific instructions are received from the investigating police. This procedure is designed to secure the safety of the students, to ensure that the rights of the victim and alleged abuser are protected, and to prevent possible destruction of evidence or flight by the alleged abuser.
- While the duty to report lies with the person who has formed the suspicion or heard the disclosure, she/he may request the principal's or designate's presence while making the report to the Children's Aid Society.
- In situations where the person with the duty to report is unable to discharge this duty, the principal or designate will, where possible, make the report in the presence of the person who has formed the suspicion or heard the disclosure.

- Once a person has formed the suspicion or heard a disclosure, the principal or designate shall not prevent a report to the Children's Aid Society being made nor will there be sanction or reprisal as a result of such action taken.

4.3.2. Inform the Children's Aid Society

- All suspicions and disclosures of abuse/neglect **MUST** be reported to the appropriate Children's Aid Society **IMMEDIATELY**.
- If advised by the Children's Aid Society worker that the suspicion or disclosure(s) does not warrant an investigation, ensure that you record the worker's name, the date, and time of the consultation.

Children's Aid Societies:

Children's Aid Society of Toronto	924-4646
Catholic Children's Aid Society of Toronto	395-1500
Jewish Family and Child Services of Toronto	638-7800

- When reporting to the appropriate Children's Aid Society, provide the required information as outlined in the "Record of Report of Abuse/Neglect" form D:001A, attached.
- Make sure that the C.A.S. knows what the timelines are (such as when the child is expected at home) so its response can be prioritized accordingly. The C.A.S. also requires time to make arrangements for an investigation. This is an especially important factor when dealing with kindergarten children attending half-day programs.
- As the safety and protection of the student is the Board's paramount concern, the reporter should inform the C.A.S. regarding the child or her/his family circumstances which may help in the investigation. In addition, the reporter should ask the following questions:
 - How and when should the parents be contacted?
 - Will the child be interviewed?
 - Do the investigators plan to come to the school or home? When? Will they be investigating or only consulting?
 - May the child go home at lunch or after school if the interview has not yet taken place?
 - What information can be shared with the child and her/his parent(s) if the interview has not yet taken place?

REMEMBER: No notice to parent(s)/guardian(s) of victim without approval. After a report has been made to the police, the parent/guardian should not be notified until there has been consultation with the police.

- After reporting, the reporter should take the following steps:
 - Have a trusted person (most likely the person to whom the child disclosed) stay with the child until the police/C.A.S. team arrives at the school (recognizing that the child requires support during this period).
 - The child may wish to have a support person with her/him during the interview. If the child indicates that she/he wants support, the police should be advised and permission sought. The support person should be a person of the child's choosing.
- If unsure whether the abuse/neglect should be reported, consult:
 - Student Services can be consulted (see Student and Community Services Co-ordinators, page 52).
 - A child abuse resource person can also be consulted (see Student and Community Services Co-ordinators, page 52).
 - An intake worker for a Children's Aid Society can also be consulted without naming the suspected victim.

REMEMBER: Do not investigate disclosure. Once a disclosure has been made, the disclosing student/former student will not be questioned by any other school staff, nor shall any other inquiries be made until specific directions are received from the investigating police and /or CAS.

4.4. Procedures for Dealing With Alleged Perpetrator (Board Employee or Volunteer)

4.4.1. Alternate Assignments For Implicated Staff During Investigation

Where a student/former student discloses sexual abuse/sexual assault by a staff member and the police have begun an investigation, that staff member will be assigned, as soon as possible, to suitable alternate duties outside the school, not involving contact with students until the police investigation has been completed. In the case of a teacher or unionized employee, she/he must be notified of the right to contact her/his federation/union representative.

4.4.2. After Charges Laid

Where a staff member is charged with a criminal offence of a sexual nature involving students or young persons under the age of 16, whether or not they are students/former students of the Toronto District School Board, that staff member will be assigned immediately to suitable alternative duties outside the school, not involving contact with students until the charges have been disposed of.

The charged perpetrator should be informed that notification will be given to the school community regarding the charges.

4.4.3. Upon Completion of Police Investigation/Acquittal/Conviction or Where No Investigation

Upon completion of a police investigation, acquittal or conviction, or where no criminal investigation has been undertaken, the assignment/status of the employee will be reviewed by the Office of the Director. Such review may include an internal investigation and subsequent action such as discipline or support including counselling.

The employee will be dismissed from employment if convicted of a sexual offence against a student, or if an internal investigation determines, on a balance of probabilities, that the employee sexually abused, sexually exploited or sexually assaulted the student. Where the employee is a member of a professional college/society/association, a report of professional misconduct will be made to that college/society/association by the Director of Education or designate.

4.5. Document the Incident(s)

- Documentation of suspected abuse/neglect cases should be carefully prepared and maintained in accordance with the "Record of Report of Abuse/Neglect" form D:001A, attached. The report must:
 - be factual (including dates and time) and contain no opinions;
 - be brief and to the point; and,
 - contain questions asked of the student, information seen or heard by the teacher, principal or designate, and other observers.
- The "Record of Report of Abuse/Neglect" form will be forwarded, in a sealed envelope marked "Private and Confidential", to the Executive Officer of Student and Community Services or designate for secure storage. The Ontario Student Record (O.S.R.) of the student will contain a notice that a report was made to the Children's Aid Society and that a copy of the form is on file in Student Services.
- The "Record of Report of Abuse/Neglect" form and any other written records may be subject to subpoena or disclosure in any subsequent court hearing.

4.6. Follow-up With Police/Children's Aid Society

- If it is not apparent that an investigation has commenced within 24 hours, it is the responsibility of the principal or designate to contact the police/Children's Aid Society to ascertain the status of the case.
- It is the responsibility of the principal or designate to notify the police/Children's Aid Society when a child is known to have been reported to be at risk or found to be in need of protection and has transferred schools or moved to another Board.

4.7. Notify Social Worker/Student Services Worker

- It is the responsibility of the principal or designate to notify the social worker or Student Services worker assigned to the school so that appropriate support and counselling can be offered to the child and family.

4.8. Support for Students, Parents and Staff

- In the case of criminal charges being laid, as outlined above, the Board will, under the co-ordination of the response team, provide appropriate support for the affected school community. The response team will meet with the staff of the school as soon as possible to advise of the charges, the status of the accused staff member and describe a plan of action for dealing with students and the school community. Individual counselling for staff will be offered.
- The response team (see 4.1) will, in most cases, inform students about the charges, the status of the accused staff member and offer individual counselling to students.
- A meeting with parents will be scheduled as soon as possible to explain the school response, answer questions and provide advice for dealing with the personal safety of their children.

4.9. Communications Subsequent to Disclosure

- Principals and staff shall not communicate with other students, other parents, or the community about the disclosure or criminal charges until the appropriate superintendent and resource person have been consulted and the superintendent has consulted with the Director of Education about the specific communication.
- 5. Procedures Dealing With Sexual Abuse, Sexual Assault and Sexually Intrusive Behaviour: Victim is Student Any Age, Alleged Perpetrator is Student Who is Under 12 Years of Age**

[NOT REPRODUCED]

- 6. Procedures Dealing With Sexual Abuse and Sexual Assault: Victim is Student Any Age, Alleged Perpetrator is Student Who is 12 Years of Age or Older**

[NOT REPRODUCED]

- 7. Procedures Dealing With Physical or Sexual Abuse and/or Sexual Assault: Victim is Student Who is 16 Years of Age or Older, Alleged Perpetrator is Outside of the School System**

[NOT REPRODUCED]

8. Procedures Dealing With Sexual Abuse and/or Sexual Assault: Victim is Student Who is 16 Years of Age or Older, Alleged Perpetrator is Board Employee or Volunteer

8.1 Board Policy on Sexual Relationships Between Staff and Students/Former Students

- 8.1.1. Board staff/volunteers working directly with a student of any age in their professional capacity (see 8.1.3. below) will not enter into a sexual relationship with that student during the course of the professional relationship or for a period of one year thereafter.
- 8.1.2. In the case of students/former students under the age of 18, any such relationship, in addition to being a serious breach of Board policy, is also a criminal offence of sexual exploitation or sexual assault.
- 8.1.3. Professional capacity shall mean working or volunteering in the same school as the student is enrolled or otherwise supervising, counselling, coaching or assisting in extra curricular activities in which the student is participating regardless of which school the student attends.

8.2 Reporting

8.2.1. Police/Children's Aid Society

There is no legal duty to report to the C.A.S. if a student/former student is 16 or over when the alleged offence occurs. These students/former students are nonetheless still protected under the Criminal Code for such offences as sexual assault and sexual exploitation and, therefore, the police must be immediately contacted. The student/former student should be informed that the police will be called. The reported sexual abuse/sexual assault may be current or historical.

The social worker or Student Services worker assigned to the school must be notified so that support and counselling can be offered to the student/former student.

8.2.2. Principal

A teacher, Board employee or volunteer must report to the principal or designate:

- when there are reasonable grounds to believe that a student/former student may be suffering or has suffered sexual assault or exploitation involving an employee or volunteer.
- when a disclosure is made to an employee or volunteer by a student/former student of sexual assault or exploitation involving a person(s) employed or volunteering in Toronto District School Board schools.

Note: If the principal is the alleged perpetrator, the school superintendent shall be notified. In such a case, read school superintendent wherever principal is indicated below.

8.2.3. Notice to Board Resource Persons/Convening a Response Team

The principal will immediately contact one of the following child abuse resource persons so that a response team can be convened to assist the school. In most cases, this response team will be comprised of a representative of the Communications and Public Affairs Office, the appropriate school superintendent, a social worker, and the principal or designate of the school. The response team will use Board staff who are specialists in sexual abuse/sexual assault issues to implement any intervention in the school including informing students and staff, counselling students and staff and providing advice to parents.

Toronto District School Board
Child Abuse Resource Persons (see page 52)

8.3. Do Not Investigate Disclosure

Once a disclosure has been made, the disclosing student/former student will not be questioned by any other school staff, nor shall any other inquiries be made until specific directions are received from the investigating police.

8.4. No Notice to Parent(s)/Guardian(s) of Victim Without Approval

After a report has been made to the police, **the parents/guardians should not be notified** until there has been consultation with the police and specific consent from the student/former student.

8.5. Procedures for Dealing With Alleged Perpetrator (Board Employee or Volunteer)

8.5.1. Do Not Contact Implicated Staff Member

The principal or designate will notify immediately the appropriate superintendent. Under no circumstances shall the implicated staff member be contacted until specific instructions are received from the investigating police.

This procedure is designed to secure the safety of the students, to ensure that the rights of the victim and alleged abuser are protected, and to prevent possible destruction of evidence or flight by the alleged abuser.

8.5.2. Alternate Assignment For Implicated Staff During Investigation

Where a student/former student discloses sexual abuse/sexual assault by a staff member and the police have begun an investigation, that staff member will be

assigned, as soon as possible, to suitable alternate duties outside the school, not involving contact with students until the police investigation has been completed. In the case of a teacher or unionized employee, she/he must be notified of the right to contact her/his federation/union representative.

8.5.3. After Charges Laid

Where a staff member is charged with a criminal offence of a sexual nature involving students/former students of any age, or young persons under the age of 18, whether or not they are students/former students of the Toronto District School Board, that staff member will be assigned immediately to suitable alternate duties outside the school, not involving contact with students until the charges have been disposed of.

The charged perpetrator should be informed that notification will be given to the community regarding the charges.

8.5.4. Upon Completion of Police Investigation/Acquittal/Conviction or Where No Investigation

Upon completion of a police investigation, acquittal or conviction, or where no criminal investigation has been undertaken, the assignment/status of the employee will be reviewed by the Office of the Director. Such review may include an internal investigation and subsequent action such as discipline or support including counselling.

The employee will be dismissed from employment if convicted of a sexual offence against a student, or if an internal investigation determines, on a balance of probabilities, that the employee sexually exploited or sexually assaulted the student. Where the employee is a member of a professional college/society/association, a report of professional misconduct will be made to that college/society/association by the Director of Education or designate.

8.6. Support for Students, Parents and Staff

- Following disclosure or criminal charges, as outlined above, the Board will provide appropriate support for the affected school community. Where the victim is a current student the Board will, under the co-ordination of the response team, provide appropriate support for the affected school community. The response team will meet with the staff of the school as soon as possible to advise of the charges, the status of the accused staff member and describe a plan of action for dealing with students and the school community. Individual counselling for staff will be offered.
- The response team will, in most cases, inform students about the charges, the status of the accused staff member and offer individual counselling to students.

- A meeting with parents will be scheduled as soon as possible to explain the school response, answer questions and provide advice for dealing with the personal safety of their children.

8.7. Communications Subsequent to Disclosure

- Principals and staff shall not communicate with other students, other parents, or the community about the disclosure or criminal charges until the appropriate superintendent and resource person have been consulted and the superintendent has consulted with the Director of Education about the specific communication.

9. Procedures Dealing With Sexual Abuse and/or Sexual Assault: Sex Offender in the Community

[NOT REPRODUCED]

**Toronto District
School Board**

Form D: 001A

Rev: 10/27/99

Record of Report of Abuse or Neglect

Date of Report _____
Y/M/D

Child's Name _____ Date of Birth _____ Student # _____
Last Name Given Name Y/M/D

Sibling(s) _____
Last Name Given Name(s)

Address _____ Telephone _____
Apt./ Street No. City Postal Code

Mother's Full Name _____ Business Phone (_____) _____
Last Name Given name

Father's Full Name _____ Business Phone (_____) _____
Last Name Given name

School Name _____ Phone _____ Grade _____

School Address _____

Religion _____ Medical Concerns _____

- What the child said and to whom
 - When and where the incident(s) occurred
 - Brief description of easily visible marks or injuries or evidence of neglect
 - The alleged offender(s) and relationship to the child
 - Names of any other children who might be involved
- Details of Abuse/Neglect**

Keep your consultation to the minimum. This report form and any other written records may be subpoenaed in subsequent legal proceedings.

(use the back of this form if more writing space is needed)

Any learning disability, exceptionality of language difficulty which may impede the student in expressing or understanding written/oral communication _____

Language(s) spoken at home _____

Person making report _____ Date _____
Last Name First Name Position Y/M/D

Name of _____ Worker _____
Children's Aid Society Last Name First Name

Investigation undertaken? Yes No

School _____ Principal _____

Send marked "Private and Confidential" to Executive Officer, Student and Community Services or Designate.

**✓ CHECKLIST
FOR FORMAL REPORTS OF
CHILD ABUSE/NEGLECT**

- Informed school principal or designate of your suspicion(s)
- Obtained consultation from appropriate resource (i.e., social worker/Student Services worker, child abuse resource person, Children's Aid Society worker).
- Documented details of disclosure, completed "Record of Report of Abuse/Neglect" form.
- Reported suspected abuse/neglect to appropriate Children's Aid Society.
- Ensured that the student is prepared and supported for possible outcomes which will follow.
- Sought support for oneself or others involved.
- Informed social worker/Student Services worker assigned to school.

***At any time, help is available from your school social worker.**

Possible Indicators of Child Abuse

Indicators do not prove that a child has been abused. They are clues that should alert teachers that abuse may have occurred. It is not the job of the teacher to assess the physical or psychological state of a child or others involved. It is the teacher's responsibility to report any suspicions to a children's aid society. The assessment and validation of allegations of child abuse is the role of police and/or children's aid society.

The objectives of this section are:

- to learn guidelines for documenting indicators of abuse
- to provide a list of indicators which will serve as a tool to detect and report suspicions of child abuse
- to recognize normal and problematic sexual behaviour in school-age children

Those signs, symptoms or clues when found on their own or in various combinations which may point to child abuse, are called indicators. Indicators may:

- be apparent in the child's physical condition and/or manifested in the child's behaviour;
- manifest in the behaviours and attitudes of adults who abuse children, and cause others to question their care of children (although most adults who have abused children are not mentally ill, risk factors to take into account are adults that present with some personal dysfunction, such as mental illness, personality disorder or substance abuse);
- be non-specific and common in children and therefore difficult to assess why they are present, for example bed-wetting nightmares, clinging or increased self-stimulation may be related to stress in the child's life such as marital discord, family illness or death;
- point to a history of abuse such as the re-enactment of adult sexual behaviour or explicit sexual knowledge inappropriate to the child's age and stage of development

Indicators do not prove that a child has been abused. They are clues that should alert teachers that abuse may have occurred. It is not the job of the teacher to assess the physical or psychological state of a child or others involved. It is the teacher's responsibility to report any suspicions to a children's aid society. The assessment and validation of allegations of child abuse is the role of police and/or children's aid society.

Documenting Indicators of Child Abuse

All observed indicators should be fully documented. This process helps to put the information in perspective, assists school personnel in reporting to a children's aid society, and provides a record in the investigation and court processes. When recording any information, it is important to:

- provide a description that is clear and concise;
- be objective and non-judgmental;
- avoid interpretations of medical, physical or emotional conditions, and what you think is happening;
- record any conversations, word for word, between yourself and the child, or any others relevant to the situation;
- record what the child or others said, *using their own words*;
- provide a full description of any injury, including size, colour, shape and placement on the body;
- sign and date the handwritten form;
- document any further suspicions that may arise.

Possible Indicators of Neglect

[NOT REPRODUCED]

Possible Indicators of Physical Abuse

[NOT REPRODUCED]

Possible Indicators of Sexual Abuse

Physical Indicators of Children	Behavioural Indicators in Children	Behaviours Observed in Adults Who Abuse Children
<ul style="list-style-type: none"> * Unusual or excess itching or pain in the throat, genital or anal area * Odour or discharge from genital area * Stained or bloody underclothing * Pain on urination, elimination, sitting down, walking or swallowing * Blood in urine or stool * Injury to the breasts, genital area: redness, bruising, lacerations, tears, swelling, bleeding * Poor personal hygiene * Sexually transmitted disease * Pregnancy 	<ul style="list-style-type: none"> * Age-inappropriate sexual play with toys, self, others * Re-enactment of adult sexual activities * Age-inappropriate explicit drawings, descriptions * Bizarre, sophisticated or unusual sexual knowledge * Sexualized behaviours with other children, adults * Reluctance or refusal to go to a parent, relative, friend for no apparent reason, mistrust of others * Recurring physical complaints with no physical basis * Unexplained changes in personality (e.g. outgoing child becomes withdrawn, global distrust of others) * Nightmares, night terrors and sleep disturbances * Clinging or extreme seeking of affection or attention * Regressive behaviour (e.g. bed-wetting, thumb-sucking) * Resists being undressed, or when undressing shows apprehension or fear * Engages in self-destructive and self-mutilating behaviours (e.g. substance abuse, eating disorders, suicide) * Child may act out sexually or become involved in prostitution * Discloses abuse 	<ul style="list-style-type: none"> * May be unusually overprotective, over-involved in the child (e.g. clings to the child for comfort) * Is frequently alone with the child and is socially isolated * May be jealous of the child's relationships with peers or adults * Discourages, disallows child to have unsupervised contact with peers * States that the child is sexual or provocative * Shows physical contact or affection for the child that appears sexual in nature * Relationship with the child may be inappropriate, sexualized or spousal in nature * May abuse substances to lower inhibitions against sexually abusive behaviour * Permits or encourages the child to engage in sexual behaviour

Possible Indicators of Emotional Abuse

Physical Indicators of Children	Behavioural Indicators in Children	Behaviours Observed in Adults Who Abuse Children
<ul style="list-style-type: none"> • Child fails to thrive • Frequent psychosomatic complaints, headaches, nausea, abdominal pain • Wetting or soiling • Dressed differently from other children in the family • Has substandard living conditions compared to other children in the family • May have unusual appearance, e.g. bizarre haircuts, dress, decorations 	<ul style="list-style-type: none"> • Developmental lags • Prolonged unhappiness, stress, withdrawal, aggressiveness, anger • Regressive behaviours and/or habit disorders, e.g. toileting problems, thumb-sucking, constant rocking • Overly compliant, too well mannered • Extreme attention-seeking behaviours • Self-destructive behaviour, e.g. suicide threats or attempts, substance abuse • Overly self-critical • Such high self-expectations that frustration and failure result, or avoids activities for fear of failure • Sets unrealistic goals to gain adult approval • Fearful of the consequences of one's actions • Runs away • Assumes parental role • Poor peer relationships • Discloses abuse 	<ul style="list-style-type: none"> • Consistently rejects the child • Consistently degrades the child, verbalizing negative feelings about the child to the child and others • Blames the child for problems, difficulties, disappointments • Treats and/or describes the child as different from other children and siblings • Identifies child with a disliked/hated person • Consistently ignores the child, actively refuses to help the child or acknowledge the child's requests • Isolates the child, does not allow the child to have contact with others both inside and outside the family, e.g. locks the child in a closet or room • Corrupts the child, teaches of reinforces criminal behaviour, provides antisocial role-modeling, exploits the child for own gain • Terrorizes the child, e.g. threatens the child with physical harm or death, threatens someone or something the child treasures • Forces the child to watch physical harm being inflicted on a loved one • Withholds physical and verbal affection from the child • Makes excessive demands of the child • Exposes the child to sexualized/violent media, e.g. videos, TV

School-aged Children's Sexual Behaviour in Context

The following chart (adapted from Johnson, 1996) includes sexual behaviours which typically manifest themselves to the school-age years. Sexual behaviour is presented on a continuum as: "okay"-behaviours that are expected, healthy and within the normal range for children; "worrisome"-behaviours that may require some redirection or intervention; and "get help"-problematic behaviours that persist or are dangerous physically or psychologically and usually require professional help.

Types of Behaviour	Okay	Worrisome	Get Help
Nature of Sexual Awareness	<ul style="list-style-type: none"> * Asks age-appropriate questions about sexual characteristics and reproduction * Includes genitals on drawings of people * Looks at pictures of nude people * Mocks opposite gender * Demonstrates personal boundaries, wants privacy in the bathroom and when changing 	<ul style="list-style-type: none"> * Shows fear of anxiety around sexual topics * Includes genitals in drawings of one sex and not the other * Genitals are a prominent feature in the picture, out of proportion * Fascinated with pictures of nude people * Confused about male and female differences, even after they have been explained * Wants to be opposite gender * Becomes very upset when personal boundaries are violated 	<ul style="list-style-type: none"> * Asks almost endless questions on topics related to sex * Knows too much about sexuality for age and stage of development * Self-stimulates with pictures of nude people * Hates being own gender * Hates own genitals * Demands privacy in an aggressive or overly upset manner
Self-exploration	<ul style="list-style-type: none"> * Has erections * Touches own genitals as a self-soothing behaviour, e.g. when going to sleep, when feeling sick or tense 	<ul style="list-style-type: none"> * Self-stimulates on furniture, uses objects to self-stimulate * Imitates sexual behaviour with dolls or toys * Continues to self-stimulate in public after being told this behaviour should take place in private 	<ul style="list-style-type: none"> * Self-stimulates publicly or privately to the exclusion of other activities * Self-stimulates on other people * Has adult arousal qualities in response to self-stimulating behaviours

Relationships	<ul style="list-style-type: none"> * Kisses and hugs people who are significant to them * thinks opposite sex have "cooties" * Chases them * May exchange information on sexual discoveries * Talks about sex with friends, talks about having a boy/girlfriend * May imitate sex in rudimentary fashion * Likes telling and listening to "dirty" jokes * Uses inappropriate language or slang for toileting and sexual functions * Older children play games with peers related to sex and/or sexuality * Emotional tone of behaviour is fun, silly, maybe embarrassed 	<ul style="list-style-type: none"> * Afraid of being kissed or hugged * Talks or acts in a sexualized manner with others * Romanticizes all relationships * Focused on sexual aspects of adult relationships * Refuses contact with opposite sex * Talks or engages in play about sex to the exclusion of other topics * Continues to tell "dirty" jokes after limits set * Continues to use inappropriate sexual language or slang after limits are set * Uses sexual terms to insult or intimidate others * makes sexual sounds at inappropriate times * Wants to play games related to sex and/or sexuality with much younger or older children * Continually wants to touch other people * Tries to engage in adult sexual behaviours * Simulates sexual activity with clothes on 	<ul style="list-style-type: none"> * Sexualizes all relationships * Hurts and/or avoids certain types of individuals, e.g. the opposite sex, women, men, people with certain characteristics such as facial hair * Dramatic play of sad, angry or aggressive scenes between people * Talks about sex and sexual acts habitually and continues after limits are set * Continues to tell "dirty" jokes even after being reprimanded * Continually uses inappropriate sexual language and slang without regard for limits set * Demands to see the genitals of other children or adults * Forces, bullies or manipulated other children into playing sexual games, disrobing, touching of genitals, engaging in sexual behaviour, simulating sexual activity with clothes off
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Student and Community Services Co-ordinators

[NOT REPRODUCED]



METROPOLITAN TORONTO

CHILD SEXUAL ABUSE PROTOCOL Third Edition

March 1995

Guidelines and Procedures for a Coordinated Response to Child Sexual Abuse in Metropolitan Toronto

Children's Aid Society of Metropolitan Toronto, Catholic Children's Aid Society of Metropolitan Toronto, Jewish Child & Family Service of Metropolitan Toronto, Metropolitan Toronto Police, Ministry of the Attorney General, Ministry of the Solicitor General and Correctional Services (Toronto Region), Ministry of Community and Social Services, Young Offender Services Toronto Area Office, Board of Education for the City of Scarborough, Board of Education for the City of Toronto, Board of Education for the City of Etobicoke, Board of Education for the City of York, East York Board of Education, Board of Education for the City of North York, Metropolitan Toronto School Board, Metropolitan Toronto Separate School Board, The Metropolitan Toronto Special Committee on Child Abuse.

CHILD SEXUAL ABUSE PROTOCOL, THIRD EDITION

*Guidelines and Procedures for a Coordinated Response
to Child Sexual Abuse in Metropolitan Toronto*

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PART I: SOME KEY CONCEPTS

DEFINITION OF CHILD SEXUAL ABUSE

Child Sexual Abuse refers to the use of a child by an adult for sexual purposes whether or not consent is alleged to have been given. It includes: acts of exposure; sexual touching; oral, anal or vaginal penetration; and the exposing of a child to, or involving a child in, pornography or prostitution.

Any form of direct or indirect sexual contact between a child and an adult is abusive since it is motivated purely by adult needs and involves a child who, by virtue of her/his age and position in life, is unable to give consent.

Sexual activity between children constitutes sexual abuse when it is clear, by differences in developmental levels, coercion and/or lack of mutuality, that one child is taking advantage of the other. This same criteria must be applied when the children involved are siblings.

THE DILEMMA

The lack of a statutory/legal definition of sexual abuse means that different definitions are used amongst and within mandated systems as well as by the community at large.

This lack of a formal definition presents a challenge for everyone. It increases the potential for inconsistent levels of reporting from the community, and varying responses from the CAS and the police. In addition, investigations that are initiated independently by either the police or CAS could result in a significant criminal or child protection element being missed.

THE CONCEPT OF THE TEAM

A key element of this Protocol is the agreed upon concept of the team approach to the investigation, prosecution and case management of sexual abuse cases. In Metro Toronto a designated CAS worker and a police officer shall constitute the Team, conduct all interviews together and communicate at every stage of the investigation. As each case progresses through child welfare proceedings, criminal court proceedings, and through to post disposition, the concept of the Team continues to apply but the members shift to include the Crown Attorney and then the probation officer as active members of the Team.

A Team response shall be required for all allegations of sexual abuse involving a child where the circumstances could be a violation of the Criminal Code and render the child in need of protection under the Child and Family Services Act (1984), and where the alleged offender (whether adult or child) has some element of charge over the child victim.

PART I: SOME KEY CONCEPTS

DEFINITION OF TERMS

For purposes of this Protocol, the term "child" refers to any person under the age of 16 years as defined by the Child and Family Services Act (1984) Part III, s. 37(l). (CESA)

The term "Children's Aid Society or "CAS" refers to the three mandated child protection agencies within the Metropolitan Toronto Region including the Children's Aid Society of Metropolitan Toronto (CASMT), the Catholic Children's Aid Society (CCAS) and the Jewish Family and Child Service (JF&CS).

PART II: INTRODUCTION**DESIGNATED PERSONNEL**

1. Investigations of sexual abuse complaints should be conducted only by designated police officers and by designated CAS workers. However, if a complaint arises in the context of an active child protection case, the existing family service worker may be assigned as the prime investigator for the CAS.
2. The CAS and the police will ensure that a designated CAS worker and a designated police officer are available at all times. Where designated personnel are not immediately available, the CAS supervisor or the officer on charge of the Police Division shall assign alternative, qualified/designated personnel to handle the case.

Commitment:

Personnel deemed to be "designated" for the purpose of this Protocol are: CAS workers, police officers, Crown Attorneys, and probation officers. In designating personnel, each system or agency has indicated its adherence to a commitment that such designation is essential for the well-being of children who are the subjects of child sexual abuse investigations.

The manner and nature of "designation" has been determined by each system and agency. However, the term "designated" generally means that identified professionals have:

- specialized training and education specific to the issues of child sexual abuse; and
- advanced skills in investigating or prosecuting cases of child sexual abuse, or in working with offenders convicted of sexual offences against children.

Designated workers within the CAS are generally members of the intake staff. Designated police officers are those who have taken the specialized training facilitated by the Metropolitan Toronto Police Force. Designated probation officers, both Phase I and Phase II, are those assigned to handle convicted sex offenders. All full time assistant Crown Attorneys are assigned to sexual abuse cases.

PART II: INTRODUCTION

The following knowledge and skills are considered important for 'Designated personnel':¹

a. Knowledge

For purposes of this document, the word "knowledge" refers to familiarity with findings of scientific research, the accumulation of clinical practical wisdom and an awareness of the values set out in the philosophical principles.

Designated personnel should be conversant with the following:

- *Protocol Guidelines, Rationale and Philosophical Principles*
- *Normal child development including:*
 - cognitive
 - communication/language
 - sexual
 - issues related to memory
- *Sensitivity to:*
 - cultural issues
 - special needs issues
 - gender issues
 - geographical needs
- *Issues related to confidentiality and disclosure of information*
- *Human sexual development*
- *Indicators of child sexual abuse, including knowledge of "risk factors" (both risk "of" abuse and risk "to" abuse)*
- *Dynamics of child sexual abuse*
- *Prevalence of child sexual abuse*
- *Issues related to abuse in custody/access situations*
- *The process of disclosure*
- *Child Sexual Abuse Accommodation Syndrome² including:*
 - recantation
 - delayed disclosure
 - secrecy
 - helplessness
 - entrapment and accommodation
- *The Validation/Verification Process*
- *Impact of trauma on a child victim*
- *Impact on family members, both offending and non-offending*
- *Use of the Victim Impact Statement*

¹ Knowledge & skills will vary according to professional group.

² See Summit, R., *The Child Sexual Abuse Accommodation Syndrome*. *Child Abuse and Neglect*, 7, p. 177-193. (1983).

PART II: INTRODUCTION

- *Legislative Information including:*
 - appropriate Criminal Code, Young Offenders Act and Canada Evidence Act provisions
 - the Criminal Court process
 - testimonial aids, both legislative and non-legislative
 - the use of expert testimony
 - CESA provisions including Child Abuse Register and Expunction Hearings
 - the Family Court process
- *Adult sex offender knowledge including:*
 - patterns of offending
 - risk assessment
 - profile (defence mechanisms, denial, minimization)
 - grooming process
 - recidivism rates
 - treatment options
- *Adolescent sex offender knowledge including:*
 - issues related to gender
 - patterns of offending
 - risk assessment
 - profile (defence mechanisms, denial, minimization)
 - recidivism rates
 - treatment options
- *Sexual activity amongst children and youth including:*
 - sexually intrusive/offending behaviour of young children
 - adolescent sexual offending patterns
- *Resources available for children, families and offenders.*

b. Skills

For purposes of this document, the word "skill" is defined as the ability to integrate knowledge and put it into practice bearing in mind the child's best interests. In this sense, practitioners should, according to their particular discipline, be able to:

- *Work with other disciplines in a team context*
- *Case-Manage/coordinate child sexual abuse and/or sex offender cases including:*
 - ongoing assessment, case planning, trauma assessment and treatment for child, family and offender
 - disclosure, investigation, prosecution
 - crisis intervention
 - case transfers

PART II: INTRODUCTION

- *crisis intervention*
- *treatment*
- * *Communicate with:*
 - *very young children*
 - *older children/adolescents*
 - *parents*
 - *offenders, both adult and adolescent*
 - *other professionals*
- * *Assess trauma to child and non-offending family members*
- * *Interview according to proper investigative procedures *including use of videotape (for designated personnel) ensuring that:*
 - *trauma to the child is minimized*
 - *integrity of the interview process is maintained*
 - *questions/comments are non-leading*
- * *Prepare for court (for Crown) including:*
 - *interview and prepare child for court*
 - *manage a child's evidence in court*
 - *create a child-friendly atmosphere in court*
 - *recognize the need for, and obtain, expert witness(es)*
 - *present case in court*
- * *Assess risk of:*
 - *abuse or further abuse*
 - *offending or re-offending*
- * *Assess allegations of abuse*
- * *Interview a child (for non-designated personnel) ensuring that:*
 - *the child is not traumatized*
 - *the investigation is not jeopardized*
 - *the appropriate information is gathered*
- * *Measure impact of trauma on Child:*
 - *during the disclosure*
 - *regarding reaction of family/whether there is a support person within family*
 - *during the investigation*
 - *during the court process(es)*
 - *whether or not there is a guilty plea or a finding of guilt*
 - *after the court process*
- * *Give evidence in court*
- * *Advocate for the child victim*

PART II: INTRODUCTION

- *Supervise child sexual abuse and offender cases and provide staff with:*
 - *support*
 - *direction*
 - *ongoing training opportunities*
- *Use Judgement, life experiences & knowledge/training in dealing with child sexual abuse and sex offender cases.*

There are a number of reasons why specialized knowledge and skills are important in dealing with cases of child sexual abuse. Some of these are as follows:

- *The child and/or family often wish to protect the accused;*
- *Child victims are often unaware that what was done to them was a crime;*
- *Strong emotional ties can exist between a victim and the accused;*
- *Often the abuse occurred over a long period of time and information can become distorted;*
- *Sometimes there are multiple offences which children confuse or which they mix events;*
- *Although corroborating evidence is not legally required, it is still, in practice, critical to assist in getting a criminal conviction;*
- *Capacity of very young children to verbalize can make interviewing very difficult; and*
- *Many cases are difficult to validate.*

THE INVESTIGATIVE TEAM

3. **The designated police officer and the designated CAS worker shall act as a Team in the investigation and assessment of all reports of sexual abuse of children where the alleged offender has some element of charge over the child. Responsibility for specific duties should be as defined in this Protocol. The designated police officer shall have prime responsibility for the criminal investigation, identification of the alleged offender, and the laying of criminal charges; and the designated CAS worker shall have prime responsibility for the child protection investigation and for protection of the child.**
4. **To facilitate collaboration and cooperation, there should be full verbal disclosure between the designated police officer and the designated CAS worker at all times.**

PART II: INTRODUCTION

The Team Concept

The Team concept is central to the success of the Protocol. It facilitates information sharing, maximizes resources and ensures the needs of the child remain foremost in any child sexual abuse investigation and/or prosecution.

Prior to the use of joint investigations, children in Metro Toronto were often interviewed several times by numbers of different professionals. Not only was this practice harmful to children, it also risked contaminating any potential criminal procedure.

The dual purpose of the initial investigation is to:

- (1) *assess any protection concerns regarding the child and ensure his/her immediate safety; and*
- (2) *determine whether a criminal offence has occurred.*

CAS workers and police officers are each mandated to carry out separate functions. The practice of joint investigations emphasizes ongoing dialogue between the involved professionals and can result in fewer interviews and less trauma for the child.

It should be noted here that the CAS is not necessarily involved in all cases of sexual abuse/assaults against children. The reality of limited resources, among other reasons, makes this impossible. Part II ("Initial Stages of the Investigation") outlines some of those situations and can provide a useful checklist for police officers, alerting them to the issues to be discussed when reporting to a designated CAS worker.

Although the CAS itself has not the means to provide support services to all victims and their families, the agency can offer case management services and coordinate and/or offer referrals to appropriate services.

Exchange of Information Between Team Members

During an investigation of child sexual abuse where the safety of a child is at risk, the CAS and police should exchange relevant information freely. The concept of sharing information within this context has been examined by legal counsel from both systems, as well as by Freedom of Information specialists (both provincial and municipal), and is considered to be well within the legal boundaries of information exchange.

PART II: INTRODUCTION

Where a privacy issue is in question, Release of Information forms can be signed by the appropriate person(s).

Additionally, each professional should be aware of the policies and procedures related to the sharing of information within his/her own system. If there appears to be a barrier or impediment to the disclosure of information, the professional should consult with legal counsel about how the exchange might be expedited (e.g., through subpoena). (For example, the CAS is specifically prohibited under the CESA from revealing information regarding the registration of an individual on the current provincial child abuse register.)

There will be situations where one of the Team must proceed with an investigation alone. In the event that designated personnel are not available from the police or CAS, the remaining Team member should, as soon as possible, provide the other member with a thorough account of the interview. All future decisions should be based on the Team approach.

The Process of Disclosure

For purposes of investigations, it is important to think of disclosure as a "process" rather than a single event and thus to allow enough time and resources to carry out a number of progressive interviews, if necessary.

In a study of 630 cases of child sexual abuse involving children ranging in age from three to seventeen years, the majority initially denied the abuse (Sorensen and Snow, 1991). When disclosure was made, it was generally done as a "process" rather than as a single event, with definable phases and characteristics.

Disclosure, once it came, was either "active" (where the child/adolescent gave a detailed, coherent account of the abuse) or "tentative" (where the child/adolescent moved through a number of steps before actually disclosing).

The steps involved in a "tentative" disclosure included the process of:

- *forgetting;*
- *distancing;*
- *minimizing;*
- *dissociating; and,*
- *discounting.*

The time frame for disclosing (whether active or tentative) varied from situation to situation, with some happening in a single interview and others taking several months. Additionally, whether the disclosure was "active" or "tentative", it was often initially denied.

PART II: INTRODUCTION

In fact, in 75% of cases where abuse was eventually confirmed (through guilty pleas, convictions and/or medical evidence), the victims initially denied that abuse had occurred; and of those who recanted after initially disclosing, 93% later reconfirmed the abuse.

A further finding in the study relates to age and disclosure: The authors found that preschool children were more likely to disclose accidentally, while adolescents were more likely to disclose purposefully.³

³ Sorensen and Snow. "The Process of Disclosure" in *Child Welfare Journal*, Vol. LXX, No. 1, Jan./Feb. 1991, pp. 3-15. This study not only confirmed the "accommodation syndrome" as delineated by Summit (*op. cit.*), it also clarified and specified the process through which children and adolescents disclose sexual abuse.

PART III: RESPONDING TO THE INITIAL REPORT FROM THE COMMUNITY**MUTUAL REPORTING**

- (A). **ALL REPORTS OF SEXUAL ABUSE OF A CHILD RECEIVED BY EITHER THE POLICE OR THE CAS SHALL BE REPORTED TO THE OTHER AND DOCUMENTED BY EACH AGENCY ACCORDING TO ITS INTERNAL PROCEDURES.**
1. When a report or a suspicion of sexual abuse comes to the Children's Aid Society, the call should be transferred immediately to a designated CAS worker. The designated CAS worker should advise, discuss and mutually plan the interview with a designated police officer before attending at the scene.
 2. When the report of sexual abuse comes from the CAS to the police, the call should be transferred immediately to a designated police officer who should discuss the report with a designated CAS worker before attending at the scene.
 3. When a report or a suspicion of sexual abuse comes from the community to the police, the uniformed officer who responds to this report should confirm the complaint, secure the situation (if necessary), then advise the officer in charge of the Division to notify a designated police officer. The designated police officer should then advise, discuss the report and plan a joint interview with a designated CAS worker before attending at the scene.
 4. When a report or a suspicion of sexual abuse comes to the CAS from the community or to the police after normal CAS business hours, CAS "Emergency After Hours Service" and a designated police officer will decide whether or not the investigation should proceed immediately or be scheduled for another time. Factors to consider include:
 - a) immediate safety of the child;
 - b) apprehension of the alleged offender;
 - c) potential for gathering forensic medical evidence;
 - d) effects on other evidence;
 - e) whether the quality of the investigation will suffer from a delay; and
 - f) disruption to the child's sleep, and/or hour of night.
 5. Where the occurrence arises in one Police Division and the child lives in another, the designated police officer in the Police Division where the child lives shall conduct the investigation.

PART III: RESPONDING TO THE INITIAL REPORT FROM THE COMMUNITY**Mutual Reporting**

The organization/agency which initially receives a report or allegation of child sexual abuse should contact the other organization/agency prior to an interview/investigation being started. Reporting of all such cases from the CAS to the police or vice versa ensures that, regardless of which system (police or the CAS) receives the report, both systems will be informed and the statutory requirements of both can thus be fulfilled. Mutual reporting is fundamental to the success of the Protocol.

Both the CAS and the police must be involved and conduct joint investigations for all allegations of child sexual abuse as defined by the CFSA. There are, however, situations of sexual abuse/assault against a child where only the police might conduct the investigation.

In order to determine whether a joint investigation is appropriate and/or necessary, this Protocol requires that designated CAS workers and designated police officers discuss each report of child sexual assault before an investigation is commenced. Each system will then determine the extent and nature of its involvement based on the following:

- *the facts of the case;*
- *the risk of further abuse;*
- *the alleged offender's position with other children;*
- *the needs of the victim and family; and*
- *available resources.*

Police Response

Guideline #5, Part III was developed to meet the needs of the child victim in that she/he will deal with the Police Division in her/his own community, close to home. Exceptions to this guideline would apply when the situation is of an emergency nature and requires immediate police response and when abuse occurs outside of Metropolitan Toronto.

PART IV: INITIAL STAGES OF THE INVESTIGATION**INITIAL STAGES OF THE INVESTIGATION**

1. The Team should proceed on the assumption that the child's report or disclosure warrants a full investigation. A subsequent recanting by the child should not be taken as proof that the abuse did not occur. Children who cannot verbalize a report due to communication barriers may provide key information through their behaviour.
2. The Team should contact a resource person from the community and seek her/his assistance, support and consultation where cases involve:
 - a) children with communication difficulties;
 - b) children with special language needs;
 - c) children with a hearing impairment;
 - d) children under the age of five; and
 - e) children who are developmentally disabled.

These resource persons may be required to assist in the investigative interview in order to facilitate accurate communication.

Commentary**Reports that involve additional/challenging circumstances or variables**

Reports from children in a variety of circumstances and situations pose unique challenges to the CAS and the police. Children in such circumstances are often at greater risk of abuse yet their cases may be the most difficult to substantiate.

Children with communication difficulties

Professionally qualified interpreters, rather than family or friends, should be used where possible. Such interpreters are often licensed or have taken specialized training to communicate with, for example, children with a hearing impairment, autistic children and others. Qualified interpreters are available through the organizations and/or associations who work with such children on a daily basis. Some examples are: the Canadian Hearing Society and the Geneva Centre. Where indicated, community resource persons can be consulted about getting help to bridge the gap between investigators and the child.

PART IV: INITIAL STAGES OF THE INVESTIGATION

Following are some examples where interpreters might be required:

1. **Non-English-speaking children:** There are many children for whom English is not their first language and who would be unable to provide a full account of the allegations without the use of an interpreter. Interpreters should be aware of cultural issues which may affect comprehension (e.g., dialects) and expression. Even though children may have some knowledge of English, the investigators should be aware that, if English is *not* the child's first language, the assistance of an interpreter should be sought. If the child is stressed or frightened she/he could regress and, with that regression, could resort to his/her first language, both in comprehension and expression. Interpreters can be accessed both through the Ontario Interpreter's Service and the Metropolitan Toronto Police Department.
2. **Children with special language needs:** The use of facilitated communication, for example, should be considered for children exhibiting communication disorders due to autism. Assistance is available through the Geneva Centre.
3. **Children who are hearing impaired:** In cases involving children who are hearing impaired, only specified professionals, for example those who are listed with the Canadian Hearing Society, should be used during an investigation.

School board social work crisis teams could also be considered as resources to help bridge the gap (provided parents are in agreement), as they may well have ongoing contact with the child beyond the investigative stage.

Children under the age of five years

Special interviewing skills and a specific knowledge base about developmental levels are required when working with children under five. This group can be challenging for adults because of their limited verbal and comprehension skills. These children can be the most vulnerable victims due to their age, dependence on others and perceived lack of credibility, yet it is not uncommon for investigators to stop an investigation with a child in this age group either because they are unable to communicate with the child or are uncomfortable with the child's behaviour (e.g., lack of attention, unfocused, fidgety). This age group can be considered a "special needs" group and the Team may require resource persons to assist in the interview. Such resource persons could include, for example, social workers, therapists, physicians, teachers or any professional who specializes in this age group.

PART IV: INITIAL STAGES OF THE INVESTIGATION

Allegations involving Children with Disabilities

Children with physical, mental and developmental disabilities are at a much greater risk of being abused than non-disabled children (Sobsey, 1988).

A survey carried out in the late 1980's indicated that 50% of disabled women had been sexually assaulted. 30% of the respondents said the abuse occurred under the age of 12 and 31% said they were abused before 18. In some cases the risk is believed to be at least 150% more for people with disabilities (Riddington, 1989).

Many factors may contribute to the increased risk that these children face including:

- *the inability to communicate in the conventional sense;*
- *the inability of children with a disability to physically defend themselves;*
- *environmental factors such as isolation within the home or institution;*
- *lack of sex education to assist in distinguishing between healthy versus exploitive or abusive touch;*
- *the need for continual attendant care by different caregivers; and*
- *in general, society's lack of respect for persons with disabilities.*

It will be important for the Team to take all these factors into consideration when conducting an investigation involving children with disabilities, whether developmental or physical. Specialized resource persons from the community may be required to assist in the investigation.

- a) ***Children with Physical Disabilities:*** Research done at the Alberta Developmental Disabilities Centre indicated that almost 30% of assaults against persons with disabilities were perpetrated by specialized service providers (Sobsey, 1988). Because so many children with physical disabilities must rely on service providers for their every need, they are at particular risk for abuse. These children often experience forms of touching which are necessary to enable them to live as independently as possible. For example, they may require assistance in eating, dressing, toileting and washing; they may also require assistance in communicating, travelling and learning. Those service providers who carry out these tasks are, of necessity, in positions of trust in respect to these children; and the physical contact these children must, of necessity, have with a large number of caregivers puts them at greater risk for abuse than the majority of the population.

PART IV: INITIAL STAGES OF THE INVESTIGATION

It is imperative that children with physical disabilities know the difference between normal/necessary forms of touching and abuse, and that they learn how to let someone know if they are victims of any inappropriate behaviour or unwanted touches.⁴

- b) **Children with Developmental Disabilities:** Children with a developmental disability are children who learn more slowly than others, whether the disability is genetic (e.g., Down's Syndrome) or as the result of a brain injury or (as is presently being explored) as a result of physical and/or sexual abuse.⁵

In addition, the disability can range from mild (where the child/adolescent can function relatively well) to very severe (where the child/adolescent is unable to talk or to care for him/herself).

Many children with a developmental disability are very vulnerable to abuse for the following reasons:⁶

- *usually they receive little or no education in the areas of sexuality or abuse. If there is sex education, it consists primarily of naming body parts (reproductive, not sexual) and learning about pregnancy and birth control, including sterilization);*
- *there is inconsistent training regarding abuse identification, reporting and/or prevention amongst those professionals that these children would be in daily contact with;*
- *much of the emphasis in education has been on compliance and on maintaining dependence on others for any decision-making;*

Cont'd

⁴ Adapted from *Responding to the Abuse of People with Disabilities*. ARCH Toronto, 1990

⁵ Surrey Place Centre in Toronto is currently exploring the misdiagnosis of children who, as a result of abuse, have had their cognitive capacity affected and have been incorrectly diagnosed as being developmentally disabled.

⁶ Adapted from: *Family Violence and People with a Mental Handicap*. Ottawa: Department of Health. The National Clearing House, 1993.

PART IV: INITIAL STAGES OF THE INVESTIGATION

- because of their limited opportunity to make their own decisions, many of these children fail to develop a strong sense of self-esteem. In addition, they may develop a sense of failure and experience rejection when they cannot adapt themselves to fit the "social norms"; and
- segregation, whether in education, employment or housing, means that there are limited opportunities to participate in ordinary social settings. This, in turn, increases their dependency on family members or service providers for support and advocacy.

Conducting an Interview

*Although these children will have the same psychological problems and behaviours that other child abuse victims have, interviewing them will require additional special strategies and techniques, particularly in the area of communication. During the interview, it will be important for the Team to:*⁷

- use what has been labelled "plain English"; i.e., language that does not exceed a grade 6 level;
- match the sentence structure of the victim. For example, if she/he uses only one of two words in a sentence, the interviewer should do likewise;
- refrain from asking "why" or making abstract comments as they may only confuse and/or distress the victim;
- ask the victim, on a frequent basis, what a particular word or phrase means for him/her;
- avoid talking to older child or adolescent as if she/he were a small child. Although the victim may have the mental age of a four year old, this does not mean she/he should be treated as such;
- do not use a condescending tone of voice;
- avoid using terms of endearment or touching the victim; and
- remember that the interview may take longer than planned.

⁷ Adapted from: Nora Baladerian, Ph.D. "Interviewing Skills to used with Abuse Victims Who have Developmental Disabilities". Washington: NARCEA, 1993.

PART IV: INITIAL STAGES OF THE INVESTIGATION***Allegations involving children in residential care***

Investigations in residential care settings may be complicated both from an investigative and organizational perspective. This complexity is due, in part, to the following:⁸

- *the number of children in the setting who may be possible victims;*
- *possible behavioural problems and/or developmental limitations of the residents,*
- *the number of placement agencies and/or parents responsible for these children;*
- *the fact that one or more members of the staff may be alleged abusers; and*
- *(the possible) involvement of the Ministry of Community and Social Services (MCSS) program supervisor in addition to the CAS and police.*

Children's Residential Licensing Directives (MCSS) require that residential care settings (as defined by the CFSA establish joint protocols with the local CAS for abuse investigations. As well, all such settings are required to report suspected abuse to the CAS as per s. 72 of the CFSA.

The residential care setting must not undertake to conduct its own internal sexual abuse investigation; this remains the mandate of the CAS and police. Staff have been advised that they should work cooperatively with the Team throughout the investigation and should have no direct involvement in it unless so directed by the investigative Team. If the Team encounters any difficulties in this area, it might be useful to refer to the internal protocol of the institution.

Where children are living in residential care settings, parent(s)/guardian(s) may fear reprisal from staff should abuse be reported, particularly if they have become very dependent on the caregivers. If the alleged abuser is a member of staff, some parents might prefer having that employee either dismissed or disciplined rather than having a report made to the authorities, particularly if they do not wish to create complications for the setting and the caregivers on whom they have become dependent.

If a report is subsequently made in these circumstances, the possibility for recantation exists.

In investigating allegations of sexual abuse within residential care settings, the Team will need to take into consideration the unique concerns of parent(s)/guardian(s) and of non-offending staff members.

⁸ Adapted from: *Preferred Practices for Investigating Allegations of Child Abuse in Residential Care Settings*. Toronto: IPCA, 1992, p. 1.

PART IV: INITIAL STAGES OF THE INVESTIGATION

Other considerations in these investigations include the possible involvement of: Children's Aid Societies from other jurisdictions; Ministry of Community and Social Services (MCSS) program supervisor(s); and the staff of any on-site school program.

Allegations arising in custody and access disputes

Investigations involving these types of allegations can be difficult in that information is often received from a parent or other adult and the Team is sometimes unable to have it substantiated by the child. Additionally, there is a mistaken belief that a high number of allegations within this context are false or contrived. This belief can result in a reluctance to investigate such reports or in a predetermined conclusion about the report's validity.

There are, however, many reasons why an abusive situation could come to light only after parents have separated. These include:

- *the child may feel safe enough for the first time to disclose about previous abuse;*
- *the child may be fearful of an upcoming visit due to previous abuse;*
- *the child may feel that all previous threats against him/herself or the allied parent now are not likely to occur because of the separation;*
- *the thought of being isolated with the offending parent may be more threatening to the child than when the child and offender were living in the same home; and*
- *the non-offending parent (usually the mother) may now feel safe enough to report the abuse.*

Children in these situations are often very young, their communication skills are limited and they cannot successfully argue on their own behalf. They are potentially at high risk since, without substantiation of the allegations, the accused parent may continue to have or gain access to, or custody of, the child. In these circumstances, the abusive parent gains extended and private access to the child as well as increased opportunity for abuse and coercion.

In a study by Thoennes and Tjagen (1990) involving over 9,000 custody and divorce disputes, allegations of abuse occurred, on an average, 2% of the time. Abuse was deemed to have occurred in 50% of these cases. In 17%, the allegations were either unfounded or impossible to validate.⁹

⁹ For a study done on allegations of abuse in custody/divorce disputes, see Thoennes and Tjagen. 'The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes" in Child Abuse and Neglect, Vol. 14, 1990, pp. 151-163. See also information on "False allegations" in Part III of this document.

PART IV: INITIAL STAGES OF THE INVESTIGATION

The investigating Team must be aware of some of the unique aspects of these types of allegations, as well as of any preconceived notions they themselves might hold about the validity of such allegations.¹⁰

Young Offenders who disclose that they are victims

Although not included in the guidelines (above), young offenders who, in the course of their questioning, disclose that they themselves were victims of abuse can pose unique issues for investigators. Research has indicated that 25% of adolescent offenders may themselves have been victims of sexual abuse (Mathews, 1987). In the context of an investigation involving a youth as a suspect or offender, the youth may disclose a previous or ongoing abuse in his/her life. When such a disclosure is made by a young offender, it should be followed up by both CAS and the police. If the police, in the course of their investigation, learn of past abuse of the young accused person, they should call a designated CAS worker immediately to conduct a joint investigation.

INITIAL STAGES OF THE INVESTIGATION

3. Where a Native child is involved in the investigation, the designated CAS worker will notify, with consent of the parent(s), Native Child and Family Services of Metropolitan Toronto of the report.

Native Child and Family Services may:

- a) assist the investigators in all aspects of the investigation;
- b) facilitate a referral for therapy and support;
- c) be available for consultation; and,
- d) assist in placing the child into care if apprehended.

¹⁰ See also information on "False allegations" in Part III of this document.

PART IV: INITIAL STAGES OF THE INVESTIGATION

Commentary

Native Child and Family Services

Native Child and Family Services of Toronto (NCFS)¹¹ has provided culturally sensitive support and assistance to Native families living in Metropolitan Toronto since 1988.

It is not a child protection agency but is available to assist the three child protection agencies and the police in investigations involving Native children. CAS's have an agreement with NCFS designed to address problems in responding to issues of this client group.

Historically, the police and child protection agencies have had poor relationships with Native people. Therefore it is essential for the Team to involve the NCFS at the earliest possible point in the investigation if Native children are involved. In addition to supporting the investigation, NCFS can provide counselling or assist in referrals to community resources.

INITIAL STAGES OF THE INVESTIGATION

4. An interview of the person who initially reported the sexual abuse should be conducted as determined by the Team. Any concerns raised regarding, for example, retaliation, confidentiality or follow-up should be addressed.
5. Reports received from anonymous callers are valid referrals and should be taken seriously. The caller's words should be recorded precisely and verbatim.
6. The police officer should check C.P.I.C. and police records regarding the alleged offender.
7. The CAS worker should check CAS records and the Child Abuse Register regarding possible information on the child, family and/or alleged offender.

¹¹ At the time of this printing, the Ministry of Community and Social Services had granted approval to Native Child and Family Services to develop as a full Children's Aid Society under the Child and Family Services Act, 1984 (CDSA). This Protocol may need to be changed accordingly as the development process is carried out.

PART IV: INITIAL STAGES OF THE INVESTIGATION**INITIAL STAGES OF THE INVESTIGATION**

8. The Police/CAS Team should see the child together as soon as possible. The timing of the interview following the report shall be determined by the Team, considering the following factors:
 - a) the immediate safety of the child;
 - b) the possibility of gathering forensic evidence;
 - c) the need for a collaborative plan to interview multiple victims;
 - d) the proximity of the child to the alleged offender;
 - e) the securing of relevant evidence;
 - f) apprehending the alleged offender;
 - g) consideration of the child's physical and emotional needs; and
 - h) the availability of the allied parent(s).
9. Where a parent or legal guardian is not the suspected person and is unaware of the child's disclosure, the Team should make all reasonable efforts to contact the parent(s)/legal guardian(s) prior to interviewing the child.
10. If the Team determines that it is not appropriate to contact the parent(s)/legal guardian(s) prior to the child's interview, the parent(s)/legal guardian(s) should be informed immediately following it or as soon as is reasonably possible.

Commentary**Timing of Investigation after report is received.****I. Seeing the Child:**

CAS workers are obligated, by the Ministry of Community and Social Service's Standards, to see a child who is alleged to have been abused, within 12 hours of the report:

PART IV: INITIAL STAGES OF THE INVESTIGATION

"The Child alleged to have been abused, shall be seen as soon as possible. Timing is based on professional Judgement of urgency, but in every instance, the child who is the subject of a report of child abuse will be seen no later than twelve hours after receipt of the report. Where seeing the child is delayed beyond the 12 hour maximum, the ... reasons [shall be] documented.¹²

In addition, the following factors should be considered when assessing the timing/urgency of proceeding with an investigation:¹³

- *the immediate risk to the child;*
- *if there is injury to the child;*
- *the potential for injury to the child;*
- *that possible evidence (e.g. forensic evidence) is likely to be available only at the time of reporting; and*
- *the immediate need for support and reassurance if the child or allied parent is upset.*

2. Contacting Parents/Guardians:

Factors to consider when deciding whether or not to contact parents prior to interviewing their child include:

- *whether one of the parents is the alleged offender;*
- *whether the alleged offender is a family member and there is a concern that the parent may contact him/her first;*
- *whether the child requests that a parent be present;*
- *whether a medical examination must be done immediately; and*
- *if the parent(s) cannot be reached and the investigation must proceed immediately.*

Contacting parent(s)/legal guardian(s) could involve a phone call that provides minimal information about police and CAS involvement with their child. The Team should decide on the content and extent of the information that should be given to them on that initial contact.

¹² Adapted from Standard #3, *Revised Standards for the Investigation and Management of Child Abuse Cases by the Children's Aid Societies Under the Child and Family Services Act*. Toronto: MCSS, 1992 p. 13. Standard #3 also requires CAS workers to review the decision to delay with the supervisor.

¹³ *Ibid.* pp. 13-14.

PART IV: INITIAL STAGES OF THE INVESTIGATION**INITIAL STAGES OF THE INVESTIGATION****CAS/Police as Alleged Offender**

11. a) When there is a report of sexual abuse and the alleged offender is an employee of a CAS, the investigation will be conducted by a designated worker from one of the other two societies along with a designated police officer.
- b) The investigating designated CAS worker should notify a designated police officer immediately.
12. When there is a report of sexual abuse and the alleged offender is a police officer of the Metropolitan Toronto Police Force, the investigation will be conducted by an investigator assigned by a Command Officer, along with a designated CAS worker.
13. Personnel in each of these investigations will be deemed to be the investigative Team and shall follow the procedures outlined in this Protocol.

Commentary**In-House Investigations**

The Catholic Children's Aid Society (CCAS), Children's Aid Society of Metropolitan Toronto (CASMT), and Jewish Family and Child Service (JF&CS) have agreed upon an inter-agency policy where allegations of abuse involve an employee as an alleged offender. When an allegation is made, the identified central contact person within that agency will be notified. This person will contact one of the other two agencies. In turn, this agency will identify a designated CAS worker who, in conjunction with a designated police officer, will conduct the investigation.

In cases where an allegation arises in a foster home, the investigation will be conducted by a designated intake worker and not by the child's worker. In some situations, another agency will be asked to conduct the investigation.

If a Metropolitan Toronto police officer is the accused person, a Command Officer will be notified who will assign a designated officer to the case who should conduct an investigation in conjunction with a designated CAS worker.

PART IV: INITIAL STAGES OF THE INVESTIGATION

It is important for all systems (police, CAS, Crown and probation) to have a thorough and formal policy to follow when an employee is accused of sexually abusing a child. Any further contact by the accused with that child (or other children) in a work related role should, at best, be restricted until a full investigation is completed by the CAS and police.

PART V: JOINT INTERVIEW OF THE CHILD**FIRST CONTACT**

1. At the first contact with the child victim, Team members should introduce themselves and describe their roles. The designated CAS worker has prime responsibility for assessing whether the child is in need of protection. The designated police officer has prime responsibility for determining whether a criminal offence has occurred and for charging the alleged offender.

[Redacted]

The Investigative Interview

The purpose of an investigative interview is four-fold:

1. to minimize trauma of the investigation for the child;
2. to maximize the information obtained from the child about the alleged abusive event(s);
3. to minimize any possible contaminating effects the interview might have on the child's memory; and
4. to maintain the integrity of the investigative process.¹⁴

An investigator must be skilled in interviewing children of all ages, understand the developmental factors that influence a child's perception and manner of communication, and be knowledgeable about the dynamics of child sexual abuse.

The interviewers must "unlock" the information while maintaining strict adherence to legal requirements (e.g., ensuring no contamination by coaching or asking leading questions).

A basic principle is to proceed from the general to the more specific. This can require great patience on the part of the Team. An overall investigative interview format is useful in eliciting information and disclosures. One possibility is the "Stepwise Interview" developed by John Yuille and presently used by many police services and child protection agencies in Canada and the US. There is an agreement between the three Metro CAS's and the police force to be trained together in early 1995 in order to use the Yuille material more consistently.

¹⁴ For a detailed discussion of this, see Berliner and Conte. "Sexual Abuse Evaluations: Conceptual and Empirical Obstacles" in *Child Abuse and Neglect*, Vol. 17, 1993, pp. 111 - 125.

PART V: JOINT INTERVIEW OF THE CHILD

The following information is a summary of the "Stepwise" interviewing process.¹⁵

- a) **Building the Rapport:** Sufficient time must be taken to help the child relax and to build rapport with him/her. The Interviewer can use this phase to make informal assessments; for example, about the child's overall language ability, use of body language, etc.

The child should be asked to relate at least two memory episodes (e.g., a birthday or trip) which are entirely independent of the abuse allegations. This will allow the Team to note the style and content of each memory which can then serve as a comparison for later in the interview.

- b) **Introducing the Purpose of the Interview:** The interviewer should discuss the importance of telling the truth and the need for the child to focus only on his/her own experiences. The topic of the interview should follow the stepwise process as much as is possible; i.e., from the general to the more specific. Questions such as "Do you know why you are talking to us today?" could begin the process. If this doesn't introduce the topic, it will be necessary to get more specific and ask a question such as "Has anything happened to you which you would like to tell me about?" or, even more specific "Has anything happened to you which you feel unhappy or uncomfortable about?" If the interview continues and there is still no disclosure but there is good reason to suspect abuse, it may be necessary, for child protection reasons, to be more probing when introducing the topic of sexual abuse. Because of the possibility of compromising any legal proceeding, this type of probing should be done as a last resort. Under no circumstances should the name of the alleged offender or the nature of the specific allegation be mentioned.
- c) **Moving to the "Free Narrative" Phase:** This is the portion of the interview where the child provides his/her version of the event(s). It is the most important aspect of the process. The child should be asked to describe the event from the beginning and should not be interrupted, corrected or challenged once the flow has started. If there are questions, contradictions or inconsistencies, the interviewer should make notes for later reference. If the child stops, she/he should be encouraged to continue by the use of simple questions ("What happened next?") or by repeating the child's last statement ("You said so and so; then what happened?").

¹⁵ Adapted from material provided by Yuille, John, The Step Wise Interview. A Protocol for Interviewing Children, 1987.

PART V: JOINT INTERVIEW OF THE CHILD

Cont'd

Once the child has completed the narrative, she/he can be asked to repeat parts. It is important that the child understand why this is being done - not because the interviewer doubts the child, but because the interviewer must make sure she/he understands everything the child has said.

- d) **Moving to the "Open Questioning" Phase:** Some questioning is usually necessary after the narrative, particularly if the child is very young. Questions should take the form of requests for more detail (e.g., "Can you tell me more about what happened in the park?"). Again, questions asked during this phase should never lead the child or suggest that the interviewer expects a certain answer. The child should understand his/her right to say "I don't know".
- e) **Moving to the "Specific Question" Phase:** This phase, if necessary, is to provide an opportunity to clarify and expand on previous information given by the child. Questions asked during this phase may require the interviewer to provide alternatives (e.g., "Did this happen in the summer, fall or winter?" or "on your birthday or at Christmas or when you went to Wonderland?"). Information obtained from other sources must never be used. It is during this phase that interviewing aids (e.g., dolls) may be necessary.
- f) **Using Leading Questions and Suggestions:** Under some circumstances, the interviewer may need to probe a child who is unwilling to disclose and/or the interview has failed to produce sufficient information yet there is still good reason to suspect abuse has occurred. This step should be used only as a last resort and with full understanding that it may well jeopardize any criminal investigation.
- g) **Concluding the Interview:** The child should be thanked for the interview regardless of any conclusions the interviewers may have drawn, and asked if she/he has any questions or comments. The interviewer should explain to the child what the next steps will be but, under no circumstances, should any promises about future developments be made as these cannot be kept. The child should be given the opportunity to ask any final questions and invited to call on the interviewer(s) any time in the future with further questions or information.

Whether the Team is successful in moving through these stages in one interview is dependent on many factors including: the developmental age of the child; the attention span of the child; the child's comfort level with the interviewers and the time of day that an interview is to take place (e.g., nap time would be problematic for children under four years of age).

PART V: JOINT INTERVIEW OF THE CHILD

With very young children it is highly unlikely that one meeting with the child will suffice. It is more likely and beneficial if several interviews occur that are no more than a 1/2 hour in length and occur over the span of a few weeks.

SUPPORT PERSON

2. If the need arises the Team should offer the child the opportunity to have a support person just outside of the room or in the room during the interview to help her/him feel more comfortable, e.g., parent, school personnel or relative.

Commentary**Support Person**

Many children will request that a person be present during the interview. This person may be, for example, a parent, a teacher, a neighbour, a nurse or a friend. It is ultimately up to the investigators to determine how appropriate or inappropriate this person may be. In some cases children will provide more information if they feel comfortable and the presence of a support person may help to provide this comfort. But, for other children having a known adult present during the interview may actually place additional stress on the child. The child may censor what they speak about to protect the adult/support person. One option that the Team might offer to the child is to have the support person sit outside of the interview room to be available if needed. The Team should attempt to interview the child without the support person in the room, however, if the child is extremely fearful and anxious then she/he should be asked whether having an adult support person would make them feel more comfortable.

Support persons should be asked to sit behind or next to the child (but not in direct eye view) and to refrain from speaking during the interview. The reasons for these requests should be explained to the child, so she/he does not get concerned over what she/he perceives to be lack of "active" support by that person.

In some instances, the Team may have to assist adults (e.g., parents, teachers, principal), to understand that the child victim may in fact not want them in the interview since the information she/he is to give is embarrassing or too personal. In such cases, the child may be more comfortable with the Team alone.

PART V: JOINT INTERVIEW OF THE CHILD**PRIMARY INTERVIEWER**

3. The interviews should be conducted with either the designated police officer or the designated CAS worker as primary interviewer, depending on the rapport with the child, experience of the investigator and comfort level with children of that particular age.

Commentary**Primary Interviewer**

While it is agreed that the investigative interview should be conducted jointly by the police and CAS, it is recommended that one person be designated as the primary interviewer.

Neither Team member is automatically in charge of leading the interview and/or asking the questions. This decision should be made before the interview begins, using the following factors:

- *comfort level of the Team member;*
- *ability to establish rapport with children;*
- *experience in investigative interviewing of sexually abused children;*
- *knowledge of child development; and*
- *experience working with children of the same age group as the child being interviewed.*

Only one person should direct the questions to the child at one time. It is recommended that if one of the professionals is not getting far with the interview that the other professional take the lead. The interview should be organized and planned by the Team prior to meeting with the child to sort out these issues.

CHILDREN WITH SPECIAL NEEDS

4. Where cases involve children with communication difficulties/developmental delays, special language needs, hearing impairments, or children under the age of five, the investigators should seek assistance, support and consultation from specialists in the community. These resource persons may be required to assist the investigative interview in order to facilitate accurate communication.

PART V: JOINT INTERVIEW OF THE CHILD**Commentary****Children with Special Needs**

Please refer to Commentary following Guidelines 1 and 2 of Part IV- "Initial Stages of the Investigation".

INTERVIEW OF THE CHILD

5. A detailed interview of the child should be conducted by the Team, in a neutral setting considering the needs and best interests of the child.

Factors to consider in determining the location include:

- a) where and how the disclosure occurred;
 - b) reaction of the allied parent(s);
 - c) avoiding the location where the abuse occurred;
 - d) whether sibling(s) are involved;
 - e) where the victim will feel safe;
 - f) where the interview can be conducted without interruptions;
 - g) the whereabouts of the alleged offender,
 - h) accessibility of location for children with physical disabilities;
 - i) availability of a qualified interpreter;
 - j) availability of specialized professional;
 - k) availability of culturally sensitive professional(s); and,
 - l) availability of appropriate videotape facilities/equipment.
6. To encourage communication, age-appropriate language should be used. Any written statement should be in the language and sexual vocabulary of the child; i.e., the Team should not supply anatomically correct terms but have the child describe events in her/his own words.

PART V: JOINT INTERVIEW OF THE CHILD**INTERVIEW OF THE CHILD**

7. Children with exceptional (specific) communication needs may require other augmentative devices to describe the events (e.g., computer).
8. Anatomically-detailed dolls, drawings and photographs may be considered as secondary aids but only after a verbal disclosure has been ascertained. Caution should be taken when using these tools as they may inadvertently result in leading the child.

Commentary**Use of Demonstrative Tools**

When interviewing children (particularly young children), it is often helpful and sometimes necessary, to use demonstrative tools to assist the child in explaining what has happened. These tools may include pen and paper, anatomically correct dolls, drawings and puppets. Communication may take a variety of forms, verbal communication being but one. However, any demonstrative tool must be used with great caution.

Demonstrative tools should be used only after the child has demonstrated difficulty in communicating on his/her own. In addition to using these aids, the child should be encouraged to describe verbally what she/he is demonstrating in her/his actions or drawings.

Sgroi (1982) recommends that, if an interviewer chooses to use the dolls, she/he should do so by:

- *introducing them only after the child has made reference to the sexually abusive event;*
- *using them only to clarify a child's statement;*
- *not removing the doll's clothing;*
- *asking non-leading questions; e.g., if the child indicates an act with the doll's clothing on, the interviewer could ask, "How were your clothes when this happened?"*

SUPPORT DURING CRISIS OF DISCLOSURE

9. To help deal with the crisis of disclosure, the designated CAS worker should consider referring the victim and the allied parent(s) to the Crisis Support Group Program run by the Metropolitan Toronto Special Committee on Child Abuse.

PART V: JOINT INTERVIEW OF THE CHILD

Commentary

Support During Crisis of Disclosure

Experience and research confirm that the quality and intensity of the initial intervention following disclosure of sexual abuse have a direct effect upon successful resolution of the crisis experienced by the child.

There are weekly groups run by the Special Committee on Child Abuse for pre-adolescent girls, pre-adolescent boys, adolescent girls, non-offending parents and offenders. Referrals of children and parents are accepted up to one month following disclosure (with some flexibility) through the appropriate CAS. Offender referrals are accepted based on established criteria and can be made by the offender himself, CAS, Probation or any other professional.

The Importance of Providing Support

It is well established, both through clinical experience and research, that there is a strong correlation between the sensitivity of the response to the disclosure and the possibility of future trauma. Hindman (1987) has identified nine correlating factors for predicting trauma where previously only four were believed to exist. The original four factors were: (1) victim under the age of 8 years; (2) existence of violence; (3) frequency; and (4) penetration. Of the nine new factors identified by Hindman, most (if not all) can be assessed during the crisis stage, and particularly during attendance at the Crisis Support Group Program. When disclosure has occurred and sensitive intervention is available, the potential for ensuing trauma can be significantly reduced by identifying (and treating, where appropriate) the following nine factors:

- sexual responsiveness;
- terror;
- distorted offender identity,
- distorted victim identity;
- victim under the age of 12 years;
- coping skills ('footprints');
- withholding of report;
- initial response was disastrous; and
- a trauma bond exists.

The Crisis Support Group, aside from providing immediate and sensitive intervention and assessment to the child and allied parent(s), can also make recommendations for further treatment where such is indicated.

It is possible to prevent trauma if children understand that they were innocent victims of a crime and that the offender was totally responsible. If children feel responsible for their abuse, healing will not be possible.

PART V: JOINT INTERVIEW OF THE CHILD

*If children are met with supportive and positive feelings about their disclosure, rehabilitation can begin (Hindman, *op. cit.*).*

Evaluating Allegations of Abuse

Once a disclosure or suspicion has been reported, the investigative Team has the critical and challenging task of determining whether the child has indeed been a victim of sexual abuse. Various methods have been suggested recently in the research as effective ways of making this determination, but ultimately sound professional Judgement, based on reliable data, will be the determining factor. The process of validation is multi-faceted, involving sound, sensitive, non-leading investigative interviewing, observation of the child's behaviour and emotional state, presence of any corroborating evidence or witness statements combined with the use of a tool such as the "indications approach" (which makes note of the emotional reactions of the child during the interview along with previous and current behaviour and symptoms) or "statement validity analysis" (which determines whether statements are true or false). A common version of "statement validity analysis" (SVA) is the "validating checklist" developed by Dr. John Yuille.

These tools or aids should never be used in isolation from sound interviewing and good clinical Judgement. In the first place, some children are asymptomatic and can be quite calm during an interview thus invalidating use of the "indications approach". As well, there is the risk, in employing SVA, of categorizing statements too rigidly with the result that both false positives and/or false negatives can occur.¹⁶ Rather, they should be used in conjunction with a well developed protocol which emphasizes good practice and consistent interviewing techniques. A sound, thorough and non-prejudiced investigation is the best way to sort out whether or not abuse is likely to have occurred, and to determine the status of allegations.

Following is a brief discussion of the differences between "false" allegations, "unsubstantiated" allegations and "recanted" allegations:

1. **False Allegations:** A "false" allegation is one where, upon investigation, abuse is found not to exist. According to Jones and McGraw (1987), only 5% of all allegations are false, the majority of which are made by adults; less than 2% of false allegations are made by children themselves. Even in complex, disputed custody/access cases, the rate of "false" allegations is low relative to the number of actual cases.

¹⁶ For a detailed discussion of this, see Berliner and Conte (1993) "Sexual Abuse Evaluations: Conceptual and Empirical Obstacles" in *Child Abuse and Neglect*, (17), 111-125.

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And even in those cases where abuse was not found to exist, the majority were not maliciously or deliberately fabricated (Quinn, 1988).

Jones and McGraw (op. cit.) were able to draw preliminary conclusions about the features of false reports that seemed to distinguish them from reliable ones. These were:

- *a lack of accompanying emotion as the alleged abuse was being described;*
- *a lack of detail or inability to provide explicit detail (this could be a result of poor interviewing and not only because the child was coached);*
- *the use of the word "they" rather than the use of personal pronouns (e.g., "I", "we", etc.); and*
- *the use of age-inappropriate words and sentence structures when describing the alleged abuse.*

The authors note the importance of not using any one of the above factors in isolation to discriminate between reliable and false allegations. They must be applied within the context of the entire interview. They also concluded that it was important to examine the interaction of the parent and child to determine whether it is extremely intense and enmeshed; for example, the child providing emotional support for the parent rather than vice versa.

Finally, the authors suggest that the parent and child be screened for prior victimization, not that such a past history would indicate whether or not the allegation was fabricated, but rather it would raise some caution in the mind of the evaluator.¹⁷

2. **Unsubstantiated Allegations:** "Unsubstantiated" allegations are those for which there is either insufficient and/or inconsistent evidence or data to support the presence or absence of abuse. Such allegations are often lumped together with, or used interchangeably with, "false" allegations or even recanted allegations thus reinforcing the persistent perception that false allegations are very common. These allegations must not be considered "false".
3. **Recantation:** Recantation is when a child takes back the original allegation claiming it not to be true. Recantation is not unusual and should not, on its own, be taken at face value; many sexually abused children, faced with the anxiety, disruption and intrusion caused by the investigation, and/or threats from family members, will recant.

¹⁷ Adapted from Jones, D., and McGraw, J.M., (1987) "Reliable and Fictitious Accounts of Sexual Abuse to Children" in J Interpersonal Violence (2) # 1, 27-45.

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VIDEOTAPING INVESTIGATIVE INTERVIEWS¹⁸

1. All investigative interviews with child victims where child sexual abuse is alleged, shall be videotaped as a normal part of the investigative process unless circumstances dictate otherwise. The decision lies with the investigative Team. In the event of a disagreement between Team members, the final decision about whether or not to videotape shall be made by the designated police officer.
2. The Team shall explain fully to the parent and the child:
 - the purpose of the videotape;
 - the advantages of the videotape;
 - restrictions on its use; and
 - access by others to the videotape.
3. Videotaping should not occur under the following circumstances:
 - videotaping was part of the abuse process; and
 - if, after full explanation, the child objects to being videotaped.
4. Consideration not to videotape should also be given where parent(s), after full explanation, object to their child being videotaped. In these circumstances consideration must be given to their reasons, taking into account their: (a) general level of support of the child; and (b) reaction to the disclosure. Parental lack of consent, while important, is not determinative.
5. If videotaping is not done, both the designated police officer and the designated CAS worker must document their reasons for not doing so.
6. Sometimes videotaping can begin after the first interview. When a decision is made to videotape an interview that is not the initial interview, every effort shall be made to document: (a) the reason(s) for this delay; and (b) all contacts made prior to the videotaped interview.

¹⁸ At the time of printing, the details for implementation of videotaping investigative interviews, including resources for equipment, were not certain therefore, this section will not be enacted until further notice.

PART V: JOINT INTERVIEW OF THE CHILD**VIDEOTAPING INVESTIGATIVE INTERVIEWS**

7. The Team shall confirm the location of the interview from the pre-determined sites in their area. Where it is not in the child's best interests to move to a videotaping site, or where one is not available, mobile video equipment may be used.
8. The Team shall offer the child the opportunity to have another adult, or support person, in the room during the interview if that would help make the child feel more comfortable. The support person must be advised: (a) to sit where eye contact with the child cannot be made (e.g., behind the child); (b) not to participate in the interview in any way; and (c) not to make any comments about the child's disclosure. It is also important to ensure that the support person is within camera view at all times.
9. The primary interviewer will be either the designated police officer or the designated CAS worker, depending upon: (a) individual rapport with the child; (b) experience of each; and (c) comfort level with children of that age.
10. Where an initial investigative interview has been videotaped, every effort shall be made to videotape subsequent investigative interviews with the child.
11. Where an interview is to take place at a school and where the parent(s) are not available to give permission, the child shall not be removed solely for purposes of creating a videotape. In such cases, the use of a mobile video unit should be considered.
12. A child shall not be re-interviewed solely for the purposes of creating a videotape.

OWNERSHIP AND RETENTION

13. A duplicate copy of the videotape will be made by the police for police purposes and the master sealed and stored. A second copy will be made for the appropriate CAS upon request.
14. (a) Keeping in mind similar fact evidence, appeal time and dangerous offender applications, the police shall retain ownership of the original (master) videotape and their copy and shall preserve and destroy these according to police policies regarding the preservation and destruction of evidence..

PART V: JOINT INTERVIEW OF THE CHILD**OWNERSHIP AND RETENTION**

- (b) The CAS shall have ownership of its copy which shall be preserved and destroyed according to proper CAS procedures.
15. If the designated CAS worker or CAS counsel requires the original videotape for use in child protection proceedings, the designated CAS worker should advise the designated police officer as soon as possible. A summons must be issued when the original is required for child protection or expunction hearings.
16. The designated police officer should complete a short synopsis of the contents of the videotape as soon as possible for inclusion in the Crown brief. This synopsis should include: length of the tape; people present during the interview; substance of the child's allegation; and any other pertinent facts.

Commentary

There are three recording options available to interviewers investigating child sexual abuse:

1. **taking notes:** *When taking notes, it is important that the child's words and expression are recorded accurately, using quotes where possible. Care must be taken not to summarize too broadly.*
2. **audiotaping:** *The recorder must be turned on from the beginning of the interview and left on until the end. All of the interview must be recorded. Tapes can later be transcribed or summarized for purposes of a statement or synopsis.*
3. **videotaping:** *This tool provides both an accurate audio and visual account of the interview. It can be transcribed or summarized for purposes of a statement or synopsis. It can also be used: to refresh a child's memory; to consult with other investigators; to show to the non-offending parent, to show to the accused; and, subject to s. 715.1 of the CCC, as evidence in criminal proceedings.*

PART V: JOINT INTERVIEW OF THE CHILD

Of the three, videotaping can be the best option. Many communities across North America consistently videotape investigative interviews with child victim/witnesses of sexual abuse, and regard it as standard practice.

Videotaping can be beneficial in that it can:

- a) **Provide visual impact:** *The fact that "a picture speaks a thousand words" is helpful to Judges and juries when involved with cases of young and/or non-verbal children, or with cases which occurred in past years;*
- b) **Assist non-offending parent(s):** *The non-offending parent who is often emotionally torn at the beginning stages, can watch the videotape and, with the information thus gained, be better able to support the child;*
- c) **Refresh child's memory:** *All witnesses, including children, have the right to refresh their memories prior to testifying. Viewing the tape in these circumstances is a legitimate means to help refresh the child's memory;*
- d) **Elicit guilty pleas:** *The tape may prove to the defence that strong evidence exists against the accused, therefore increasing the likelihood that a guilty plea will be entered;*
- e) **Shorten child's time on the stand:** *If introduced in court, the videotape may preclude the child's having to give all the details on the stand;*
- f) **Reduce the number of interviews:** *Videotaping investigative interviews may reduce the need for additional interviews;*
- g) **Provide information closer to time of abusive incident:** *Unlike adults, tremendous developmental changes can occur with children if several months or years elapse between the initial disclosure and the trial. It is extremely helpful for the Judge and jury to see and hear the child, through the means of a videotape, describe the alleged abuse; and*
- h) **Support the integrity of the interview process:** *The best defence against allegations of coercive or leading interviewing is an audiovisual record of that interview. If the investigative interviewing has been properly conducted, the defence lawyer will have difficulty impugning the integrity of the interviewers.*

PART V: JOINT INTERVIEW OF THE CHILD**PROCEDURES for VIDEO TAPING**

When videotaping investigative interviews, the following procedures should be followed:

- **the camera must be on from the moment the child either enters the room or is spoken to, whichever comes first, and must remain on for the duration of the interview;**
- **all persons within the room must be on camera at all times to ensure no gestures, looks or other distractions are used to lead, coerce or silence the child;**
- **where possible, a close-up of the child's face should be superimposed in the corner of the screen to show expression. Where split-screen imagery is not available, ensure the child faces the camera and is the central focus;**
- **ensure continuity by having the time sequence recorded throughout the filming (e.g., use a camera which shows the time on tape or keep clock within camera view). Such is necessary to prove that there were no intervals during which, for example, the child could have been coached;**
- **once the Team has decided to videotape the investigative interview, all subsequent interviews must also be videotaped. It is important to remember that many children disclose a little bit at a time. Additionally, some children need to test the reaction of interviewers and will proceed only as they gain confidence. Thus the disclosure and all relevant facts may take a number of interviews. The "process of disclosure" is progressive and, for many children, happens over time; and**
- **use the same tape to film subsequent interviews.**

PART V: JOINT INTERVIEW OF THE CHILD**GUIDELINES for NOT VIDEOTAPING**

Sometimes it is not possible or appropriate to videotape. Each situation is unique, different and challenging in and of itself, and a decision about whether videotaping is useful or appropriate must be made in each individual situation.

If videotaping does not take place, each Team member must document clearly why the decision was made. Such documentation will be particularly important should the decision not to videotape be challenged by defence.

Some reasons which might be documented for not videotaping are:

- Videotaping was part of the abuse process;
- The child refused to be videotaped. (For documentation purposes, it is important to state the child's age and reasons.);
- The parent(s) objected to the procedure. (For documentation purposes, it is important to state clearly the parent(s) reasons and why it was not seen to be in the child's interests to proceed.);
- Videotaping was not in the child's best interests. (Reasons must be clearly documented.);
- The child begins to disclose, and stopping the process in order to videotape would seriously inhibit the process of disclosure; and
- The interview had to take place where neither taping facilities nor a mobile unit was available (e.g., at school, at a child care setting, at grandmother's, etc.).

Commentary**Some issues surrounding consent**

It is ultimately the Team's decision to use whatever tool(s) will best facilitate the interview. Legally, in Ontario, consent of neither the child nor the parent(s) is necessary for videotaping to proceed, although ethically their objections must be seriously considered. A dilemma would certainly exist, for example, if a child were adamantly against being videotaped; it is also questionable whether the Team would get an honest, candid account from a child who resisted the procedure.

Parental resistance to the procedure of videotaping, on the other hand, could indicate a number of factors.

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In many jurisdictions where videotaping is used consistently, parental objection to videotaping is seen as a flag of caution indicating, perhaps, lack of support for the child in favour of the alleged offender, particularly where the latter is a family member.

In these cases most investigators will override the parent's objections. If, on the other hand, the alleged offender is not a relative and parents are supportive of the child, the Team should decide whether proceeding with videotaping under parental objections might seriously damage relationship-building with the family and ultimately impair the investigation.

Applications under the Freedom of Information and Privacy Act

According to the Ontario Freedom of Information and Privacy Act, consent for releasing a videotape under a "Freedom of Information Application" is not necessary if the videotape is to be used for law enforcement cases, such as:

- *a criminal proceeding;*
- *a child welfare proceeding; and*
- *a consistent purpose which the individual, to whom the information relates, might reasonably have expected, including a disciplinary hearing under the Health Professionals Act.*

In other words, videotapes of child abuse investigations can be released, without consent, for the following purposes:

- *bail hearings and bail reviews;*
- *sentence hearings;*
- *child protection hearing;*
- *appeals;*
- *exchange of information (tapes) between police forces; and*
- *disclosures to defence in criminal prosecutions.*

However, consent of the child, the child's parent/guardian (if the child is under 16 years of age), the accused and the investigator is necessary for the following purposes:

- *educational programs;**
- *training;**
- *research;**
- *policy development;**
- *parole hearings;*
- *treatment for child;*

PART V: JOINT INTERVIEW OF THE CHILD

- *treatment for offender;*
- *criminal information/compensation board hearings;*
- *custody disputes; and*
- *civil proceedings/damage suits.*

Anyone involved in the videotape has the right to privacy, including the accused, but more weight will always be given to the well-being of the victim in any access to information applications. Applications are made under s. 14(l)(e) of the Freedom of Information and Privacy Act.

* *Indicates that identifying information should be deleted.*

AUDIOTAPING INTERVIEWS

1. If the interview is not videotaped it should be audiotaped unless circumstances dictate otherwise. The nature and purpose of the tape should be explained to the child, the allied parent(s) or other support person.
2. The police shall retain ownership of the original audiotape, preserve it and destroy it according to police policies regarding the preservation and destruction of evidence. If the designated CAS worker or CAS counsel wants the original tape preserved for potential use in Child Protection proceedings, the designated CAS worker should advise the designated Police officer as soon as possible.
3. Upon request by the CAS, police should provide them with a copy of the audiotape or transcript, as soon as possible.

Commentary

Since 1983, investigating Teams have used audiotaping to record their interviews. The audiotapes have in most cases been transcribed into a full written account of the investigative interview. Audiotapes have some of the same advantages as videotaping and should be used in all interviews where videotapes are not being made.

PART VII: INVESTIGATIONS ON SCHOOL PREMISES

INVESTIGATIONS ON SCHOOL PREMISES

- 1. There are four situations where sexual abuse investigations may occur on school premises:**
 - a) where abuse is disclosed at school and reported immediately by school personnel to the CAS;**
 - b) where abuse is disclosed outside the school and the police/CAS Team wishes to interview the child at the school;**
 - c) where the abuse disclosure involves school personnel as the alleged offender; and**
 - d) where the abuse disclosure involves another child (student) as an alleged offender.**
- 2. School personnel performing professional or official duties with respect to a child, including principals, teachers, social workers, educational assistants, and health care professionals, shall report immediately to the CAS, suspicion, based on reasonable grounds, that a child is, may be, or may have been sexually abused, and shall report all information on which any suspicion is based.**
- 3. School personnel shall not conduct an investigation regarding the suspicion or disclosure, and shall question the child only to clarify the nature of the complaint.**
- 4. When a report has been made, the investigative Team, in consultation with the principal, and school social worker if any, shall develop a plan which addresses the immediate needs of the victim and considers the whereabouts of the alleged offender.**
- 5. The Team should seek prior parental consent for the interview, encourage the parent(s) to attend, and give the principal of the school sufficient advance notice of its intent to visit the school, and of the parent(s)' consent to the interview.**

PART VII: INVESTIGATIONS ON SCHOOL PREMISES**INVESTIGATIONS ON SCHOOL PREMISES**

6. Where the Team has determined that the best interests of the child require that an interview take place without the prior knowledge of, and in the absence of, the parent(s), the principal may permit an interview to take place without prior parental consent if the principal is of the view that her/his discretion should be exercised in this way, and is based upon confirmation from the Team that, to the best of their knowledge, information and belief, the Team:
 - a) is investigating a reported case of suspected sexual abuse and/or related offences, with respect to that child;
 - b) is of the opinion, having considered other forms of interview, that it would be in the best interests of the child that the interview take place within the school;
 - c) intends to interview the child without the prior knowledge of, and the absence of, the parent(s) in any event; and
 - d) undertakes to inform the parent(s) of the interview as soon as is reasonably possible.
7. The Team should request that the parent(s)/legal guardian(s) and the child (if 12 years or older) sign a "Release of Information Form" to allow for full communication with the school principal.
8. Where the report involves a school employee as the alleged offender, the Team should first contact the Director of Education or her/his designate, and should proceed with the investigation in cooperation with School Board officials. School officials shall not interview or advise the alleged offender prior to police investigative interviews.
9. The Team should offer the child the opportunity to have another adult in the room during the interview to help her/him feel more comfortable.

(The principal or designate may, at her/his request, be present unless the child refuses or the Team confirms that such attendance would not be in the best interests of the child.)

PART VII: INVESTIGATIONS ON SCHOOL PREMISES**INVESTIGATIONS ON SCHOOL PREMISES**

10. The Team should provide to the principal sufficient information to enable school personnel to support the child and to continue the ongoing relationship between home and school. In particular, the Team should inform the principal as soon as possible:
 - a) if the investigation is to be delayed, and indicate when the interview of the child will occur;
 - b) that the parent(s) have been informed of any interview conducted without their previous knowledge so that school personnel may resume contact with one or both parents;
 - c) if the child is placed in the care of a CAS;
 - d) whether or not criminal charges have been laid (excluding young offender cases); and,
 - e) about the existence and terms of any court orders regarding access or contact with the child (e.g., bail conditions) excluding cases involving young offenders.
11. a) If the police conduct an investigation involving a student over the age of 12 where charges are being considered, a school principal may request that the designated police officer consider an order prohibiting contact with the victim as a condition of bail, who in turn will pass the request on to the Crown Attorney.
 - b) Where a student may be found guilty of a sexual offence, the school principal may request that the designated police officer consider recommending to the Crown Attorney that a 'No Contact' order be made as part of the terms of probation.
12. The designated police officer should advise the Director of Education whenever a "failure to report" charge is being considered against a school employee.

Commentary

The investigation of sexual abuse in the school setting has, in the past, been subject to constraints imposed by some school board policies. Deciding on access to the child at school is the responsibility of the school principal.

PART VII: INVESTIGATIONS ON SCHOOL PREMISES

There are prohibitions against interference with the child by the police or by other professionals without prior parental consent. This creates problems when the investigation centres on potential abuse by a parent or other caregiver.

School Boards readily acknowledge the primacy of the child abuse reporting requirement. The implications of this requirement in the context of child sexual abuse investigations have been the subject of considerable discussion and consultation.

The mandatory child abuse reporting requirement in S. 72 of the Child and Family Services Act applies to teachers, school principals and any other person "who, in the course of his or her professional or official duties, has reasonable grounds to suspect that a child is or may be or may have suffered abuse". This requirement takes precedence over all other relationships, policies and legislation and reflects the state's interest in protecting children from abuse.

All school boards in Metropolitan Toronto have developed guidelines for reporting child abuse. Whatever the reporting procedure (i.e., whether staff are directed to report to the principal who will, in turn, report to the CAS) all such guidelines should clearly state that it is the obligation of the person who initially suspects abuse to ensure a report is made. The CDSA sets out the penalties for a professional's failure to report child abuse (s.85) and there have been cases in Metropolitan Toronto where educational personnel have been charged by the police with failing to report.

Principals have the difficult task of balancing their duties to investigate in order to maintain proper order and discipline in their school as defined under s.236 of the Education Act and their overriding duty to report child abuse as defined in the Child and Family Services Act, and turning the investigation over to other agencies. While the dilemma of making the distinction between school discipline and a possible criminal offence is recognized, and while it is recognized that a principal is authorized under the Education Act to conduct searches in some cases where an offence is suspected, the overriding authority of the CDSA must be acknowledged where child sexual abuse is suspected.

Teachers and other school staff are often the first persons to whom children disclose about sexual abuse and therefore play a crucial role in the process which follows. The way in which the information/disclosure is received, and any subsequent questioning of the child/adolescent, could have a profound impact on the outcome of the case.

PART VII: INVESTIGATIONS ON SCHOOL PREMISES

It is important to remember that only the CAS and police are mandated to carry out an investigation and that inappropriate questioning or comments by school personnel could jeopardize a possible criminal investigation by:

- adding to the number of professionals to whom the child must repeat the details;
- causing the child to "clam up" when questioned by the authorities; and
- raising the possibility of contaminating any testimony through the use of "leading" questions.

It may, however, be necessary to explore a suspicion of abuse and this can be done without jeopardizing the case. For example, if the child states that she/he was touched on his/her "private parts" find out what is meant by the phrase "private parts" but do not go into detail about the touch. Ask if the child has told anyone, what she/he told, and what happened when she/he told. If the child is obviously upset or afraid, ask what frightens the child.

Information to be Shared

Keeping in mind that school personnel should not attempt to conduct an interview but will often be recipients of crucial information, the following data, if available, should be provided to the CAS:

a) general details:

- name of reporter and position;
- date of report;
- child's name;
- address;
- date of birth;
- name of parent(s)/guardian(s); and
- religion;
- culture,
- first language; and
- any communication barriers/difficulties.

b) details about the abuse (if available):

- what the child said, and to whom;
- when and where the incident(s) occurred;
- general affect of the child;
- alleged offender(s); and
- names of any other children who might be involved.

PART VII: INVESTIGATIONS ON SCHOOL PREMISES**When a teacher or other school personnel is the alleged offender**

Boards of Education should ensure that their internal policies contain:

- a) clear reporting procedures where an employee is accused of child sexual abuse;
- b) clear procedures regarding that employee's access to children during the course of an investigation;
- c) clear procedures about dealing with an employee who is acquitted.

The Toronto Board of Education has specifically developed a policy that deals with the above.²⁰

When a teacher, principal or other school personnel is the alleged offender, the school is under additional stress. According to section 18(l)(b) of the Regulation made under the Teaching Profession Act, teachers are directed to notify a colleague of any adverse complaint made against him/her within three (3) days. This directive has caused a great dilemma for educators. A teacher who receives a disclosure from a child regarding alleged sexual abuse by another teacher must report to a Children's Aid Society according to the CDSA. Upon reporting, a criminal investigation also commences. According to the police, under no circumstances should an alleged offender be notified before this criminal investigation has been started. To do so could be construed as interfering with a criminal investigation.

In the fall of 1994, section 18(l)(b) was challenged by a teacher who did report alleged abuse to the CAS and did not inform the accused teacher of the complaint. There has been a preliminary determination that when a teacher reports a child's disclosure of abuse, the act of reporting the disclosure pursuant to the CDSA will not constitute an adverse report. Litigation on this issue has been adjourned until late 1995. It would be helpful for all of the Metro Boards of Education to find out the final resolution of this process.

²⁰ See as a reference the Toronto Board of Education's new policy Standard Procedure #54.

PART XII: SUPPORT FOR THE CHILD AND FAMILY**TREATMENT AND SUPPORT PLAN**

1. After initial interviews of the victim and the family are completed, the designated CAS worker, in conjunction with the allied parent(s) and child, shall develop a support and treatment plan for that child and family. This plan may include:
 - a) an immediate referral to the Crisis Support Group Program or other specialized crisis program(s);
 - b) a subsequent referral to one of the inter-agency treatment programs (SASAT, TALK, ESAT or CASAT)²⁴ or other appropriate resources; and
 - c) where the offender accepts responsibility, a referral to the Crisis Support Group Offender Program or other sex offender specific treatment resource.²⁵
2. If criminal charges are laid, the Team should consider referring the child and her or his allied parent(s) or alternative support person to the Child Victim-Witness Support Program run by the Metropolitan Toronto Special Committee on Child Abuse for preparation for their role as a witness.

Commentary**Support for the Child and Family**

In cases of child sexual abuse, it has been agreed that it would be ideal if one individual were designated as responsible for providing ongoing emotional support and case advocacy on behalf of the child. Such an individual would be available immediately following disclosure, and continue with the child until the case is concluded in both the Family and Criminal Courts.

²⁴ SASAT: Scarborough Agencies Sexual Abuse Treatment Program; TALK: North York Sexual Abuse Treatment Program; ESAT: Etobicoke Sexual Abuse Treatment Program; CASAT: Central Agencies Sexual Abuse Treatment Program

²⁵ At the time of this writing, an initiative was underway in Metro that would see the development of a common or centralized intake process for treatment for all individuals who sexually offend against children.

PART XII: SUPPORT FOR THE CHILD AND FAMILY

At present, however, there is no specific person or agency available to provide the totality of this child support function. The police maintain contact with the child primarily to ensure that she/he will be available as a witness in court. The CAS provides case management and some counselling in intra-familial cases where protection concerns exist. Counsel for the child is appointed for child protection proceedings but has a limited mandate to participate in the criminal process and does not have the case management or counselling skills required. Therapeutic and treatment resources could meet these needs, but lack contact with the court system. Victim/Witness Assistance Programs in the criminal courts are intended to provide general information only.

It is, therefore, critical that each professional carry out his/her role while maintaining communication with the other professionals to ensure good case management on behalf of the child and family.

Treatment Resources

The treatment community in Metro Toronto has worked extensively to develop a coordinated, comprehensive response to child victims of sexual abuse and their families. Through the development of the Child Sexual Abuse Services in Metro Toronto: A Treatment Framework, the treatment community agreed that all sexual abuse treatment services needed to be collaborative, coordinated, comprehensive, specialized and multi modal. The result of these efforts was the creation of a continuum of treatment services which is now offered from the point of disclosure, through to completion via group, individual, dyadic and/or family treatment, as required.

The ideal first point of entry is the Crisis Support Group Program which offers immediate group service to children between the ages of four and sixteen and their non-offending (allied) parents. Participants attend group for eight weeks during which an initial trauma assessment is begun. Recommendations for on-going treatment are made, if indicated, and shared with the case manager, the child and family. If recommendations include further treatment and support then the child and allied support person are referred to one of the four Inter-Agency Treatment Programs in Metro (ESAT: Etobicoke Sexual Abuse Treatment Program; SASAT: Scarborough Agencies Sexual Abuse Treatment Program; CASAT: Central Agencies Sexual Abuse Treatment Program; TALK: North York Sexual Abuse Treatment Program.) These are specialized services serving sexually abused children, their families and offenders across Metro.

The Inter-Agency or Quadrant Programs provide on-going service through group, individual and family treatment. Where the referral is made for service other than group, the Quadrant Program Coordinator will provide information or assist in facilitating an appropriate referral to one of its member agencies.

PART XII: SUPPORT FOR THE CHILD AND FAMILY

The Quadrant Programs can also complete the assessment of the child and parent/caregiver and provide treatment appropriate to the child's needs. Upon completion of group treatment, a referral may be made to a Quadrant member agency for further follow up in the final stages of treatment. Information regarding referrals to member agencies can be provided by the Quadrant Coordinators.

Child Victim-Witness Support Program

The Child Victim-Witness Support Program (CVWSP) has been run by the Metropolitan Toronto Special Committee on Child Abuse since 1987. The aim of the program is to provide information and support to children who are expected to testify in criminal court proceedings and to their allied parent(s) or adult support person. In addition, the program aims to improve the criminal justice system's response to child victims and increase the system's sensitivity to them and their needs. A four week group program for children between 6 - 16 and their adult support people is provided as well as individual preparation sessions. Referrals of children are accepted immediately after charges are laid from the designated police officer or the CAS worker.

In addition to the specialized court support by the Special Committee, the Ministry of the Attorney General provides assistance to all witnesses who are required to testify in court through the Victim/Witness Assistance Program. Victim/Witness Coordinators are available in some of the courts across Metro (Scarborough, Etobicoke, and Old City Hall). It is helpful for a child and his/her family to meet with a coordinator prior to the court appearance.

Civil Suits

The Attorney General of Ontario has amended the Limitations Act to repeal any statute of limitation time period for cases involving sexual assault/abuse. A number of civil suits, launched by adult survivors against their perpetrators, have been successful despite the fact that some of the perpetrators were acquitted in criminal court.

It is important for professionals, including CAS workers, or Victim Assistance Program staff and others, to inform child victims and parent(s) of their options to file a civil suit against the accused.

PART XII: SUPPORT FOR THE CHILD AND FAMILY**THE ROLE OF CAS WORKER**

3. In cases of sexual abuse, the designated CAS worker shall act as support person for the child during the investigation. If the case is transferred to an ongoing CAS family service worker, that worker shall identify her/himself as soon as possible to the designated police officer.
4. The designated police officer shall assume primary responsibility for liaison and preparation of the child and allied family members for criminal court proceedings.
5. The role of the CAS worker should be to ensure that:
 - a) responsive case management occurs;
 - b) the child and family are referred to and attend treatment;
 - c) the parent(s) is/are encouraged to provide ongoing emotional support for the child;
 - d) ongoing emotional support is provided for the child during both child protection and criminal court proceedings;
 - e) coordination occurs between the child victim, family, designated police, Crown Attorney and treatment programs;
 - f) the child and family are fully informed as to the progress of the case; and
 - g) the child understands and is helped to process the outcome of any child protection or criminal court proceedings.
6. When the CAS worker decides that there are no further child protection concerns and closes the case, the CAS worker should inform the designated police officer of this, if the case is still before the criminal courts.

PART XII: SUPPORT FOR THE CHILD AND FAMILY

CRIMINAL INJURIES COMPENSATION

7. The CAS worker may see that it is necessary to inform the designated probation officer of the same (as in #6 above), post-conviction. This should occur after receiving consent from the victim and allied parent(s).
8. The child, parent(s) or legal guardian(s) should be advised by the designated CAS worker of the child's right to apply to the Criminal Injuries Compensation Board.
9. If the child is a ward of CAS, that agency should make an application on behalf of the child.

Commentary

Compensation for Criminal Injuries

The designated CAS worker or the ongoing family service worker should inform the child and/or family about the possibility of obtaining compensation for any injury arising out of the offence. This entails financial compensation for physical and/or emotional harm due to crimes. Expenses for current or future therapy may be covered.

The Office of the Official Guardian can assist a child or family with the application process.

**A REVIEW TO IDENTIFY & PREVENT SEXUAL MISCONDUCT
IN ONTARIO SCHOOLS**

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